Supreme Court, U.S.
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No. 01-

IN THE
Supreme Court of the United States

ANTHONY KEITH JOHNSON,

Petitioner,

v.

JOHN E. NAGLE, WARDEN, AND
THE ATTORNEY GENERAL OF THE STATE OF ALABAMA

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

(1) Whether the failure of counsel, who otherwise participated in their client's defense, to litigate the single issue determinative of their client's guilt or innocence of a capital offense constitutes such a failure "to subject the prosecution's case to meaningful adversarial testing" as to raise a presumption of prejudice to their client under *United States* v. *Cronic*, 466 U.S. 648 (1984).

(2) Whether, contrary to the decision of the court below and two other courts of appeals but in accordance with the decisions of five courts of appeals, the cumulative effect of trial counsel's acts and omissions must be evaluated in determining whether their representation was deficient under *Strickland* v. *Washington*, 466 U.S. 668 (1984).

(3) Whether a defendant's constitutional right under *Beck* v. *Alabama,* 447 U.S. 625 (1981), to have the jury instructed on a lesser-included offense as a viable alternative to a charge of capital murder, when the record supports such a charge, is overcome by a presumption that the jury acted rationally in convicting the defendant on the capital charge.

(4) Whether the State's suppression of a police report stating that two men other than the defendant "did the shooting" violated defendant's constitutional rights under *Brady v. Maryland*, 373 U.S. 83 (1963), and *Kyles* v. *Whitley*, 514 U.S. 419 (1995), when such information contradicted the State's claim that the defendant had participated in the shooting and the presence of others at the crime scene was critical to the jury's determination whether the defendant possessed the specific intent to kill requisite for a capital murder conviction.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI

Petitioner Anthony Keith Johnson prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Eleventh Circuit affirming the denial of his petition for habeas corpus in this death penalty case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 256 F.3d 1156 and is reproduced in the separately bound Appendix filed herewith (App. A, pp. 1a-61a.) The opinion of the district court is reported at 58 F. Supp.2d 1303 (App. B, pp. 62a-225a.) An order of the Alabama Court of Criminal Appeals dismissing petitioner's state petition for a writ of habeas corpus is reported at 612 So.2d 1288 (App. D, pp. 227a-61a.) The order of the Alabama Supreme Court denying Johnson's state petition for writ of certiorari is reported at 1993 Ala. LEXIS 303 (App. C, p. 226a).

JURISDICTION

The judgment of the court of appeals was entered on July 10, 2001. (App. A.) A timely petition for rehearing was denied on September 14, 2001. (App. H). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution reads in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without Due Process of law...

The Sixth Amendment reads in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to . . . the Assistance of Counsel for his defen[s]e.

STATEMENT OF THE CASE

Petitioner Anthony Keith Johnson was convicted of "[i]ntentionally caus[ing] the death of Kenneth Cantrell by shooting him with a pistol" while attempting to commit a robbery at the Cantrell home. The State contended at trial that Johnson actually killed Cantrell as the indictment charged, and the Alabama Court of Criminal Appeals affirmed Johnson's conviction that basis. (*See* App. G, pp. 266a-67a, 281a-82a.) The State has now conceded that Johnson did not kill the victim. The record, however, left no doubt that Johnson was present at the attempted robbery. A bullet containing glass fragments that matched a window pane in the victim's carport door was extracted from Johnson's back.

With Johnson's presence nearby during the shootout with the victim established, the only issue for the jury was whether he possessed the specific intent necessary under Alabama law for a capital murder conviction as an accomplice. However, Johnson's trial counsel, Joseph Propst and Thomas DiGiulian, made no effort to litigate the intent issue. "[C]ounsel simply did not think much about the intent issue at all." (App. B, p. 123a.)

After a three-day trial, the jury convicted Johnson of capital murder. The jury voted 9 to 3 against the death penalty. The trial judge, however, overrode the jury's recommendation and sentenced Johnson to death. The conviction was affirmed on appeal (App. G), and this Court denied Johnson's petition for certiorari, 488 U.S. 876.

A. Evidence at Trial.[1]

Cantrell ran a jewelry business from his home. Mrs. Cantrell, the only eyewitness to the crime and the first witness called to the stand, testified that in March of 1984, two men entered the Cantrell home through an exterior door that gave on the couple's carport, one of the men yelled "this is a holdup," and her husband and at least the first man through the door exchanged gunshots. Cantrell was struck by six .32 caliber bullets fired by the first intruder. When Johnson was arrested in a motel room a few days after the

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[1] Unless otherwise indicated, the statement of facts set forth herein can be found in the Eleventh Circuit's opinion. (App. A.) Citations to hearings held in February and March 1996 pursuant to Johnson's federal habeas petition are cited as "Habeas Tr. (date) at [ ]." Citations to the record of the state post-conviction proceedings are cited as "R20 at [ ]." Citations to the trial transcript are cited as "Tr. at [ ]." Citations to the pre-trial hearing are cited as "PH at [ ]."

murder, there was a .357 magnum handgun in his room. The State was unable to match any of the bullets found at the crime scene to that gun.

The State now concedes that Johnson was not the first intruder and thus that he was not the man who killed Cantrell. (R20 at 503-04.) Mrs. Cantrell's testimony and additional evidence at trial support a conclusion that Johnson was not the second intruder either, but rather a third man who was outside the house when the shootout took place. Mrs. Cantrell testified that she saw the second intruder as he approached the carport door and that he wore a brown cap. Mrs. Cantrell declined to identify Johnson as one of the intruders during pre-trial proceedings (PH at 57-58), and the defense did not ask Mrs. Cantrell at trial whether she could identify Johnson. Understandably, neither did the State. A State expert witness testified that the hair discovered in a brown cap that the police found at the scene (matching the one Mrs. Cantrell testified was worn by the second intruder) did not come from Johnson.

Mrs. Cantrell further testified that, after the exchange of gunfire, the first intruder called, apparently to a third man who was standing outside the carport door, "Come on in, Bubba . . . we have got him." The original two intruders then began moving from inside the house toward the carport door. According to Mrs. Cantrell, before they reached the door, Cantrell fired one last shot. The forensic evidence showed that Cantrell's final shot passed through a pane of glass in the carport door and struck Johnson, which is consistent with Johnson's having been "Bubba" and thus only a bystander during the shootout, guilty at most of felony murder, a non-capital crime.

B. Performance of Trial Counsel.

Under Alabama law, "a non-triggerman accomplice" can be convicted of capital murder "*if, but only if*, the defendant was an accomplice in the intentional killing as opposed to being merely an accomplice in the underlying felony." *Ex parte Raines*, 429 So. 2d 1111, 1112 (Ala. 1982) (emphasis added); Ala. Code, § 13-A-5-40(a)(2) (1975). The State therefore could not rely on the felony murder doctrine to convict Johnson of capital murder. *See Lewis* v. *State*, 456 So. 2d 413, 416 (Ala. Crim. App. 1984). Proof of complicity in the underlying felony without more is not proof of the required intentional complicity in the killing.

Because Johnson had the victim's bullet in his back, the only real issue for jury determination was whether, as a non-triggerman accomplice, he possessed the requisite intent to kill Cantrell. Johnson's trial counsel, however, failed entirely to litigate this issue. This failure manifested itself in several ways, infecting all aspects of Johnson's remarkably brief trial.[2] For example, although counsel were aware at least two or three weeks before trial that the State's expert would testify that there was a 96 percent probability that the glass fragments on the bullet in Johnson's back came from Cantrell's carport door, counsel testified that their strategy was only to challenge the proof that Johnson had been at the Cantrell home on the night of the shooting.[3] (Evidence of

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[2] Of the three trial days, the last two focused almost entirely on chain of custody testimony.

[3] Without explanation or citation to the record, the Eleventh Circuit states in a footnote that counsel did not learn of the State's evidence concerning the glass fragments until the "eve" of trial. (App. A, p. 33a.) There is no support for such a characterization of counsel's knowledge.

that strategy or any considered defense strategy is impossible to discern from the trial record.) Counsel acknowledged that the chances of success on the line of defense they purported to follow were "very dim." (R20 at 632.)

Moreover, although Johnson's counsel knew that more than two men were at the scene (*see* App. B, p. 109a n.20), they made no attempt to develop this fact either through direct testimony or cross-examination of the State's witnesses. Production of evidence that other men were present at the scene would have provided powerful support for an argument that Johnson was the third man, standing outside during the shooting and thus not sharing the gunman's intent to kill Cantrell. Other evidence whose significance was never explained to or urged upon the jury would have added to the force of the argument: the evidence that Johnson was hit by Cantrell's last shot while outside the carport door, the evidence that the two men involved in the shootout were still in the house when Johnson was hit by this shot, the forensic evidence that Johnson had not worn the brown cap worn by the second intruder, and, most compelling, Mrs. Cantrell's testimony that a third man had been called into the house after the shootout ended. As the district court found, however, counsel did not recognize the significance of Mrs. Cantrell's testimony and made no effort to pursue its exculpatory implications for their client, despite the fact that a "crucial portion" of that testimony was elicited during defense counsel's own examination of Mrs. Cantrell. (*Id.* at 107a-08a, 123a.)

Further, counsel did not request an instruction on felony murder, the only instruction that would have permitted a jury which rationally believed that the evidence showed a robbery in which Johnson played a part, and a killing that he did not intend, to record that finding. In fact, counsel acquiesced in the State's representation to the trial court that felony murder had no role in Johnson's trial (Tr. at 53-55),

and admitted that requesting a felony murder charge "never crossed their minds." (Habeas Tr. (Feb. 29, 1996) at 69.)

Finally, nowhere in counsel DiGiulian's 55-page closing argument did he assert that the State had failed to prove Johnson had the specific intent to kill Cantrell, even though he framed his closing by stating that "the State has the duty to prove to you beyond a reasonable doubt ... every circumstance, necessary to show that Keith is guilty. They can't prove — if there is eighteen circumstances they have to prove, if they prove seventeen they haven't done their job." (Tr. at 770.) Even allowing for the strategy that they professed to have adopted, there was no reason for counsel not to have argued the evidence and want of evidence that would have permitted the jury to find that the missing eighteenth circumstance in this case was Johnson's intentional participation in the killing of Cantrell.

Defense counsel apparently failed to make this argument and neglected the key evidence that would have supported it because they did not comprehend the distinction between capital murder and traditional felony murder under Alabama law. As counsel Propst testified, "You know, we looked at it like, if he was there and they all went there to rob the man and the man got killed, he is just as guilty as anybody." (Habeas Tr. (Mar. 20, 1996) at 35.) DiGiulian reflected the same misunderstanding of the law when he told the jury in the concluding sentences of his closing argument that to find that Johnson was guilty of capital murder it had to find that Johnson had been "out there." (Tr. at 820.) The district court — which thought that, despite what he said and left unsaid in his closing and although it found his testimony on the point "ambiguous," DiGiulian may have understood the law (App. B, pp. 120a-23a & n.27) — nevertheless found that "counsel simply did not think much about the intent issue at all." (*Id.* at 123a.)

C. State Collateral Review.

Petitioner's direct appeal from his conviction was perfunctory, handled by counsel different from his trial counsel but whose performance itself gave rise to a substantial claim of ineffective representation. In April 1989, Johnson commenced post-conviction proceedings through his present counsel in the Circuit Court of Morgan County pursuant to the then-applicable Rule 20 (now Rule 32) of the Alabama Rules of Criminal Procedure. During these proceedings, the State responded to Johnson's discovery requests by producing for the first time a report prepared by the Alabama Bureau of Investigation of its investigation of the Cantrell murder ("the ABI Report"), in which trial witness Sergeant Newell noted that an informant had told authorities that Garland and Wayne McCulloch "*did the shooting*" at the Cantrell home.

After conducting an evidentiary hearing on trial counsel's ineffectiveness, the court issued a one-and-a-half page order that simply listed fifteen of Johnson's claims and designated them as without merit or procedurally barred or both. (App. E.) In September 1992, the Alabama Court of Criminal Appeals affirmed. (App. D.) Johnson's petition for rehearing was denied and the Alabama Supreme Court denied Johnson's petition for writ of certiorari. (App. C.)

D. Proceedings on the Federal Habeas Petition.

In June 1993, Johnson filed his (pre-Antiterrorism and Effective Death Penalty Act) petition for a writ of habeas corpus in the United States District Court for the Northern District of Alabama alleging that, *inter alia*, trial counsel, by failing to litigate the key issue of intent, failed to subject the State's case to "meaningful adversarial testing" within the meaning of *United States* v. *Cronic*, 466 U.S. 648 (1984); trial counsel rendered ineffective assistance under *Strickland* v. *Washington*, 466 U.S. 668 (1984); the failure to instruct

the jury on felony murder violated *Beck* v. *Alabama*, 447 U.S. 625 (1981); and the State's suppression of the ABI Report violated *Brady v. Maryland*, 373 U.S. 83 (1963). In July 1999, the district court denied Johnson's petition. (App. B.)

Although Johnson's claim that "his counsel failed to seize upon the available factual and legal arguments to negate one of the elements of the crime he was charged with" was a "serious" allegation, the district court concluded that he was not eligible for a presumption of prejudice under *Cronic* because his claim did not "involv[e] a complete failure to advocate for the client." (*Id.* at 127a.)

The district court further found that none of counsel's acts considered individually resulted in a violation of *Strickland*. The court expressly rejected Johnson's claim that trial counsel's actions should be viewed collectively to determine whether their representation had been deficient and whether Johnson had suffered prejudice as a result, deriding the argument as a "volume discount theory." (*Id.* at 155a.)

Although the district court acknowledged that a felony murder instruction would have fit the facts of the case (*Id.* at 145a), the court also rejected Johnson's claim that he was constitutionally entitled to such a charge under *Beck* and *Schad* v. *Arizona*, 501 U.S. 624, 648 (1991), stating that the "pragmatic, psychological approach underlying" those decisions was "in tension" with *Strickland*'s requirements. (*Id.* at 147a n.38.) The court concluded that it was bound by "*Strickland*'s mandate" and "must therefore leave the fine adjustment of the law in this area to a higher authority." (*Id.*)

Finally, the court rejected Johnson's *Brady* claim on the ground that mere "evidence that people other than Johnson were involved in the robbery" was not material. (*Id.* at 185a.)

E. The Eleventh Circuit's Decision.

The Eleventh Circuit affirmed. The court dismissed Johnson's *Cronic* claim in a footnote on the ground that *Cronic* applies only to cases in which counsel "entirely fails to challenge the prosecution," not to cases in which counsel actively participated. (App. A, p. 47a n.17.) Consistent with circuit precedent,[4] the court of appeals did not consider whether trial counsel's challenged acts and omissions taken together constituted deficient performance under *Strickland*. Rather, the court addressed each of the challenged actions individually, dismissing each as either reasonable or non-prejudicial. (*See, e.g., id.* at 33a, 35a, 40a.)[5] The result was that the court never confronted the fact that, because counsel did not challenge the sufficiency of the State's proof of participation in the shooting, and did not argue the evidence indicating non-participation, the crucial issue of intent was never litigated.

Echoing the district court, the Eleventh Circuit rejected Johnson's *Beck* claim because the jury was instructed on intentional murder and robbery and because an instruction on felony murder "would not have changed the standard for conviction on capital murder" so that, for a jury presumed to be objective and rational, "an instruction on that offense should not have changed the outcome." (*Id.* at 39a.)

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[4] *See, e.g., Williamson* v. *Moore*, 221 F.3d 1177 (11th Cir. 2000) (analyzing defendant's claims individually, rather than collectively); *Waters* v. *Thomas*, 46 F.3d 1506, 1510-23 (11th Cir. 1995) (same).

[5] *See Kyles* v. *Whitley*, 514 U.S. 419, 440-41 (1995) (concluding that circuit court's piecemeal review of suppressed evidence indicated that it had failed to conduct the cumulative analysis required under *Brady*).

Finally, although the Eleventh Circuit rested its determination that counsel's failure to understand the significance of Mrs. Cantrell's testimony regarding the third man was excusable, in part, because before trial there was supposedly little evidence to support the theory that others had been present at Cantrell's home, the court concluded that the suppressed ABI Report was not material because it merely "identif[ied] additional participants" in the attempted robbery. (*Id.* at 53a.)

REASONS FOR GRANTING THE WRIT

This petition poses four important and substantial questions affecting the constitutional rights of criminal defendants that merit this Court's consideration in this death penalty case. Two of the questions relate to the defective performance of petitioner's trial counsel. On both of them there is a conflict among the circuits that the Court should resolve. Indeed, on the first question, this Court has just granted certiorari to review a conflicting decision of the Sixth Circuit concerning the reach of *Cronic*. The way the court below resolved the remaining two questions indicates a need for this Court to clarify the reach of two other of its major constitutional decisions.

I. THE ELEVENTH CIRCUIT'S HOLDING THAT *CRONIC* APPLIES ONLY WHEN COUNSEL "ENTIRELY FAILS TO CHALLENGE THE PROSECUTION" CONFLICTS WITH DECISIONS BY OTHER COURTS OF APPEALS

Johnson asserted that his trial counsel's failure to litigate, because they did not even "think about," the only real issue in his case — that of his intent to kill — constituted a violation of *United States* v. *Cronic*, 466 U.S. 648 (1984).

Under *Cronic*, the Sixth Amendment is violated and the result of the trial is "presumptively unreliable" when "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing." *Id.* at 659. The court of appeals dismissed Johnson's *Cronic* claim in a footnote, concluding that Johnson "plainly was not entitled to relief" because *Cronic* applies only "when counsel 'entirely' fails to challenge the prosecution, and that is indisputably not so here." (App. A, p. 47a n.17.)

The Eleventh Circuit's opinion is in direct conflict with the Sixth Circuit's decision in *Cone* v. *Bell*, 243 F.3d 961 (6th Cir. 2001), *cert. granted*, 70 U.S.L.W. 3164 (U.S. Dec. 10, 2001) (No. 01-400), in which this Court granted a writ of certiorari just three days ago. In *Cone*, the court of appeals held that trial counsel's failure to put on any evidence during the sentencing phase of a death penalty case "was not 'strategic' representation," but "nonrepresentation of the most deadly sort." *Id.* at 979. As a result of counsel's failure to litigate the sentencing issue, "the prosecutor's insistence that justice required that Cone be put to death was not subjected to 'meaningful adversarial testing.'" *Id.* (citation omitted). That was true even though counsel had litigated most vigorously the prosecution's case for conviction. The court concluded that "under *Cronic*, a presumption of prejudice is raised by counsel's behavior." *Id.* The Sixth Circuit rejected the state's argument, mirroring the holding of the court of appeals in this case, that *Cronic* does not extend to cases in which counsel "actively defended the accused at trial." *See* State's Petition for Certiorari, *Bell* v. *Cone*, Sup. Ct. No. 01-400, at p. 18. The Eleventh Circuit held to the contrary when it said that *Cronic* applies only when "counsel entirely fails to challenge the prosecution."

The Eleventh Circuit's opinion here also conflicts with decisions of the Ninth and Tenth Circuits, which hold that *Cronic*'s presumption of prejudice applies to counsel's complete failure to litigate an issue critical to the outcome of

the defendant's case. *See Osborne* v. *Shillinger*, 861 F.2d 612 (10th Cir. 1988) (finding *per se* prejudice when counsel, during sentencing phase, intentionally stressed the brutality of his client's crime, admitted that the evidence against his client was overwhelming and made statements to the press that his client had no evidence to support his claims); *United States* v. *Swanson*, 943 F.2d 1070 (9th Cir. 1991) (presuming prejudice when counsel admitted in closing argument that there was no reasonable doubt regarding "the only factual issues in dispute"); *but see Scarpa* v. *Dubois*, 38 F.3d 1, 13 n.7 (1st Cir. 1994) (distinguishing between "inept performance" analyzed under *Strickland*, and "no performance" analyzed under *Cronic*); *Woodward* v. *Collins*, 898 F.2d 1027, 1028 (5th Cir. 1990) (*Strickland* applies to "bad lawyering," while *Cronic* reaches only "no lawyering").

The Sixth, Ninth and Tenth Circuits are correct in holding that *Cronic* does not require that counsel play no role whatever in defense of his or her client to warrant a presumption of prejudice. Rather, *Cronic* requires that counsel "entirely fail to subject the prosecution's case to meaningful adversarial testing." The failure of Johnson's counsel to litigate the only fact issue in this death penalty case satisfies that requirement. The contrary decision below should be reviewed along with *Bell* v. *Cone* to resolve the circuit conflict because this case complements that decision, which concerns counsel's failure to defend against the imposition of the death penalty; this case concerns counsel's failure to defend against a conviction that made their client eligible for the death penalty.

II. THE COURTS OF APPEALS ARE IN CONFLICT OVER WHETHER *STRICKLAND* v. *WASHINGTON* REQUIRES A CUMULATIVE EVALUATION OF COUNSEL'S PERFORMANCE

Petitioner pointed to a series of serious mistakes on the part of trial counsel and argued that each, taken singly, amounted to ineffective assistance depriving Johnson of a fair trial and, in addition, that taken together they constituted a total failure to litigate the one true issue in his case. He was obviously prejudiced by this failure and thus, he argued, satisfied the standard of *Strickland* for determining when ineffectiveness of counsel results in denial of his Sixth Amendment right to counsel. The court of appeals analyzed each of the alleged derelictions separately, finding a supposed tactical decision here, a constraint imposed by the defendant's confidences there,[6] a substitute for an alleged omission here, a want of prejudice there. It engaged in no analysis of the cumulative effect of the derelictions.[7] In

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[6] The court of appeals concluded that trial counsel's failure to recognize the significance of Mrs. Cantrell's testimony did not violate *Strickland* because counsel's supposed alternative "strategy" of arguing Johnson was not at the Cantrell home was reasonable in light of privileged communications between Johnson and his trial attorneys. (App. A, pp. 28a-33a & n.10.) Testifying at post-conviction proceedings, counsel said that *none* of the decisions challenged by Johnson rested on information provided to them by their client. (Habeas Tr. (Mar. 20, 1996) at 31-32, 36-37, 41-43, 48 (Propst); *id.* at 58-59, 66, 68-71, 75 (DiGiulian).)

[7] In its footnote dismissing Johnson's claim under *Cronic*, the court described Johnson's claim as follows: "his counsel's errors, viewed in the aggregate, constitute

proceeding thus, the court aligned itself with the Fourth and Eighth Circuits. *See Fisher* v. *Angelone*, 163 F.3d 835, 852-53 (4th Cir. 1998); *Wainright* v. *Lockhart*, 80 F.2d 1226, 1233 (8th Cir. 1996); *Leary* v. *Garraghty*, 155 F. Supp.2d 568, 577 (E.D. Va. 2001) (relying on district court's decision in this case, and *Fisher* v. *Angelone,* for proposition that cumulative review does not apply in analyzing counsel's performance under *Strickland*).

The Eleventh Circuit's piecemeal approach to assessing performance error is inconsistent with this Court's opinion in *Strickland*, and is in direct conflict with decisions of the Second, Fifth, Sixth, Seventh, and Ninth and (apparently) Tenth Circuits.[8] Such disarray among the

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prejudicial ineffectiveness of counsel even if none of those errors, standing alone, constitutes a *Strickland* violation." (App. A, p. 47a n.17.) The court thus distinguished between claims of ineffectiveness under *Strickland*, which it had reviewed "standing alone," with the aggregated appraisal required by the *Cronic* test.

[8] *See, e.g., Lindstadt* v. *Keane*, 239 F.3d 191, 199-204 (2d Cir. 2001); *Livingston* v. *Johnson*, 107 F.3d 297, 308-09 (5th Cir. 1997); *Blackburn* v. *Foltz*, 828 F.2d 1177, 1184 (6th Cir. 1987); *Crisp* v. *Duckworth*, 743 F.2d 580, 582-83 (7th Cir. 1984); *Williams* v. *Calderon*, 29 F.3d 1312, 1325 (9th Cir. 1994); *Stouffer* v. *Reynolds*, 168 F.3d 1155, 1162-65 (10th Cir. 1999).

The Tenth Circuit has issued inconsistent decisions with regard to the issue, both accepting and rejecting cumulative analysis of an attorney's alleged errors. *Compare Stouffer*, 168 F.3d at 1162-65, *with Castro* v. *Ward*, 138 F.3d 810, 832 (10th Cir. 1998), and *Jones* v. *Stotts*, 59 F.3d 143, 147 (10th Cir. 1995).

courts of appeals on a critical Sixth Amendment issue of broad applicability calls for this Court's review. *See* Victor E. Flango & Patricia McKenna, *Federal Habeas Corpus Review of State Court Convictions*, 31 Cal. W.L. Rev. 237, 247 (1995) (estimating approximately 45 percent of the federal habeas petitions filed by state prisoners allege ineffective assistance of counsel). This case presents the perfect vehicle for such a review. The result of this case is that the Eleventh Circuit has held that there was a fair trial even though the only fact issue in the case was never recognized by counsel and consequently not presented to the jury.

A. The Eleventh Circuit Decision Conflicts with Those of Several Other Courts of Appeals in Not Assessing Counsel's Performance Cumulatively.

The majority of the courts of appeals that have addressed the issue have held that counsel's alleged errors must be viewed in the aggregate to determine whether counsel's conduct was constitutionally deficient. The relevant decisions of six circuits are cited in footnote 8 above. For example, in *Stouffer* v. *Reynolds*, 168 F.3d 1155 (10th Cir. 1999), the defendant alleged not only that several "specific instances [of attorney conduct fell] below an objective standard of reasonableness," but that, when viewed collectively, these individual acts left the impression that defendant "had no viable defense." *Id.* at 1162. The Tenth Circuit concluded that "[t]aken alone, no one instance establishes deficient representation. However, cumulatively, each failure underscores a fundamental lack of formulation and direction in presenting a coherent defense." *Id.* at 1163-64.

Similarly, in *Lindstadt* v. *Keane*, 239 F.3d 191 (2d Cir. 2001), the Second Circuit examined four alleged errors by counsel. The court emphasized that "[w]e need not decide

whether one or another or less than all of these four errors would suffice [to show that defense counsel's conduct was outside the range of professionally competent assistance], because *Strickland* directs us to look at the totality of the evidence before the judge or jury." *Id.* at 199. The court explicitly acknowledged that at least two of the alleged errors would not, standing alone, demonstrate deficient performance. "But when they are added to the first two, the cumulative weight of the error convinces us that the ineffectiveness of counsel reached the constitutional threshold." *Id.* at 202. The court thus concluded (before proceeding to its prejudice analysis): "We assess the impact of these [alleged performance] errors in the *aggregate*. *See Strickland*, 466 U.S. at 695-96. In that light, counsel's services to Lindstadt fell 'outside the wide range of professionally competent assistance.' *Id.* at 690." *Id.* at 204 (emphasis in original).[9]

By refusing to analyze counsel's acts and omissions cumulatively, the Eleventh Circuit cast its lot with the Fourth and Eighth Circuits, which have rejected the majority

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[9] In *Crisp* v. *Duckworth*, 743 F.2d 580, 582-83 (7th Cir. 1984), the Seventh Circuit held that collectively a "multiplicity of allegedly incompetent acts and omissions" established that counsel had not rendered effective assistance. The court said that, though it examined "each example of incompetence individually, we must also consider their cumulative effect in the light of the circumstances." It explained the logic of that proposition: On the one hand, a series of errors by counsel may not call for reversal when the entire trial record is considered. On the other hand, and pertinent to this case, "even if individual acts or omissions are not so grievous as to merit a finding of incompetence, their cumulative effect may be substantial enough to meet the *Strickland* test [for deficient performance]."

approach described above. For example, in *Fisher* v. *Angelone*, 163 F.3d 835 (4th Cir. 1998), the court rejected the defendant's assertion that "the cumulative effect of counsel's individual actions denied him of a fair trial." "Having just determined that none of counsel's actions could be considered constitutional error, it would be odd, to say the least, to conclude that those same actions, when considered collectively, deprived Fisher of a fair trial." *Id.* at 852. Although the Fourth Circuit accepted that cumulative analysis applied under *Strickland*'s prejudice prong, it concluded that such an approach was not applicable to determine whether counsel's performance was deficient. *Id.* at 853 n.9.

Similarly, in *Wainright* v. *Lockhart*, 80 F.2d 1226 (8th Cir. 1996), the Eighth Circuit held that an attorney's acts or omissions "that are not unconstitutional individually cannot be added together to create a constitutional violation.... Neither the cumulative effect of trial errors nor the cumulative effect of attorney errors are grounds for habeas relief." *Id.* at 1233. [10]

B. *Strickland* Requires a Cumulative Appraisal of Counsel's Performance and Its Impact.

The approach adopted by the majority of the courts of appeals is required by *Strickland*. In that case, this Court set out the criteria that determine when a defendant is entitled to relief because of incompetent representation. Guided by the purpose of the Sixth Amendment "to ensure a fair trial," the Court set forth a two-prong test for deciding "whether

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[10] Despite *Stouffer*, the Tenth Circuit has also endorsed this reasoning on at least two occasions. *See supra* note 8.

counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." 466 U.S. at 686.

First, the defendant must show deficient performance falling "below an objective standard of reasonableness." *Id.* at 680. The Court emphasized that the ultimate touchstone for the inquiry under the first prong of its newly articulated test was whether counsel's "assistance" or "performance" was deficient "considering all the circumstances." *Id.* at 688. Thus, although the defendant is required to identify specific "acts and omissions of counsel that are alleged not to have been the result of reasonable professional judgment," the Court stressed that, in making the performance determination, the reviewing "court should keep in mind that counsel's function ... is to make the adversarial testing process work in the particular case." *Id.* at 689-90.

That this determination requires, at least in most cases, an overall assessment of counsel's performance at trial was made clear, if *Strickland* left any doubt, in *Kimmelman* v. *Morrison*, 477 U.S. 365 (1986). There the Court said, "It will generally be appropriate for a reviewing court to assess counsel's overall performance throughout the case in order to determine whether the 'identified acts or omissions' overcome the presumption that a counsel rendered reasonable professional assistance." *Id.* at 386 (citations omitted).

In addition to proving deficient performance, *Strickland* requires a defendant to show that he or she was prejudiced by counsel's incompetency. 466 U.S. at 691-92. To find prejudice, the court must conclude that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 687, 694. It would be a bizarre doctrine that precluded a finding that a defendant was prejudiced by "unprofessional errors" because no one of them, treated singly, reached the level of defectiveness that *Strickland*

requires. *See Kyles*, 514 U.S. at 433-34, 436-37 (under *Brady*'s materiality test, which mirrors prejudice test of *Strickland*, court is required to assess the effect of suppressed evidence favorable to the defendant "collectively, not item by item.") So of course counsel's errors must be viewed in the aggregate.[11]

C. This Case Is the Appropriate Vehicle For Resolving the Split Among the Circuits On This Crucial Issue.

This case is a singularly suitable one for resolving the conflict among the courts of appeals over the propriety of a cumulative evaluation of counsel's derelictions under *Strickland*. Although the State contended at trial that Johnson actually shot Cantrell, it now concedes that the evidence was not sufficient to convict Johnson as the killer. To convict Johnson of capital murder, therefore, the State had to prove in some other way that Johnson possessed the specific intent to kill Cantrell necessary for conviction. As the district court acknowledged, Johnson's counsel should have recognized the implications of this fact for the conduct of the defense, but did not. (App. B, pp. 144a-45a.)

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[11] *See* 3 Wayne R. LaFave, Jerold H. Israel, & Nancy J. King, *Criminal Procedure* § 11.10(c) (2d ed. 1999) ("[W]hile the issues of prejudicial impact and incompetency are separate prongs of the *Strickland* [standard], the potential prejudicial impact of the subject dealt with by counsel reaches over into the competency determination, as that impact obviously relates to the care and effort expected from a competent adversary."); *cf. United States* v. *Cook*, 45 F.3d 388, 394 (10th Cir. 1995) ("*Strickland*'s performance and prejudice prongs 'partially overlap when evaluating the performance of appellate counsel.'") (*quoting Miller* v. *Keaney*, 882 F.2d 1428, 1434 (9th Cir. 1989)).

Counsel's failure of recognition was the source of virtually all the instances of incompetence that led to their client's conviction: the failure to make anything of their knowledge that more than two men were at the Cantrell home; the failure to seize upon Mrs. Cantrell's testimony indicating that their client was a third man, not one of the two original intruders; the failure to argue lack of intent to kill to the jury; the misstatement to the jury that such an intent was not needed; the acquiescence in the prosecutor's statement to the same effect; and the failure to ask that the jury be instructed on felony murder as a rational alternative to capital murder if the jurors thought Johnson lacked an intent to kill.

If cumulative evaluation of counsel's performance is not called for in this case, where virtually all of their questioned acts and omissions had a common source and a common impact in depriving the jury of an opportunity to consider petitioner's only real defense, then such evaluation is not called for in any case.

III. THE ELEVENTH CIRCUIT'S HOLDING THAT THE PRESUMPTION OF A RATIONAL JURY OVERRIDES THE CONSTITUTIONAL RULING OF *BECK* v. *ALABAMA* WARRANTS REVIEW BY THIS COURT

Beck v. *Alabama*, 447 U.S. 626 (1981), holds that a capital murder defendant is entitled, as a matter of law, to have the jury charged on a lesser-included offense — in that case felony murder — if the facts of record would support a guilty verdict on that offense. The Court reasoned that failure to give such a charge impermissibly increases the likelihood of a capital murder conviction. *Id.* at 634-37. "For when the evidence unquestionably establishes that the defendant is guilty of a serious offense — *but leaves some doubt with respect to an element that would justify conviction of a capital offense* — the failure to give the jury the 'third

option' of convicting on a lesser-included offense would seem inevitably to enhance the risk of an unwarranted conviction. *Id.* at 637 (emphasis added). "Such a risk cannot be tolerated in a case in which the defendant's life is at stake." *Id.*

The district court in this case acknowledged that a felony murder instruction would have fit the facts of the case, and that there was a substantial issue of fact as to Johnson's intent. (App. B, p. 145a.) The Eleventh Circuit did not disagree with these findings, nor did it try to defend the failure to instruct on felony murder. Instead, it held that the failure had not prejudiced Johnson. According to the Eleventh Circuit, "[a] felony murder instruction would not have changed the standard for conviction on capital murder, and so for an objective and rational jury — and we must presume that this was such a jury — an instruction on that offense should not have changed the outcome." (App. A, p. 39a.) This rationale is directly in conflict with the judgment expressed in *Beck* that failure to give the jury a realistic third option to conviction on a capital charge and acquittal is prejudicial as a matter of law because it "would seem inevitably to enhance" the chance of a capital conviction. 447 U.S. at 637.

The ruling below eviscerates *Beck*. Without acknowledging the conflict with this Court's reasoning, the Eleventh Circuit in effect has held that the failure to give a lesser-included charge could *never* constitute a violation of Due Process. In every case in which the failure to give an instruction on a lesser-included offense is raised on appeal, a jury presumed to be rational and objective will have returned a guilty verdict on a higher offense. In no such instance would an instruction on a lesser-included offense have changed the standard for conviction of the higher-degree

crime. The court reached its result by indulging in a presumption as to jury behavior that is unrealistic and is precluded by *Beck*.[12]

The ruling below also distorts *Schad* v. *Arizona*, 501 U.S. 624 (1991). There, the Court held that when more than one lesser-included, non-capital offense fits the facts of record, it is not necessary to charge on both since the necessary third option is afforded by the charge on one. The Court emphasized that its ruling was "not to suggest that *Beck* would be satisfied by instructing the jury on just any lesser-included offense, even one without any support in the evidence." *Id.* at 648. In *Schad*, petitioner had conceded that the evidence would have supported a conviction on the lesser-included charge that was given, "and that is adequate to indicate that the verdict of capital murder represented no impermissible choice." *Id.*

Thus, under *Beck* and *Schad*, a defendant's due process right to a fair trial is protected if, to the extent the facts permit, at least one lesser-included charge is given that "makes sense" in the light of the record, and therefore gives the jury "a real choice" for a third option. *Kilgore* v. *Bowersox*, 124 F. 3d 985, 995 (8th Cir. 1997); *see also Montoya* v. *Collins*, 955 F. 2d 279, 285 (5th Cir. 1995) (charges on lesser-included offenses must "present[] a realistic alternative for the jury").

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[12] We deal with the *Beck* issue in this petition as an issue of due process. No request was made at trial for a felony murder instruction, but there is plainly cause for that lapse in the unexplained failure of counsel to make the request and obvious prejudice to petitioner. The court below focused on the issue primarily as an element of counsel's incompetence, but in either form the underlying issue of whether petitioner was entitled to the instruction is presented.

In dismissing Johnson's claim that a felony murder instruction was necessary on the facts of this case, the court below did not look for lesser-included alternatives that could be said to "make sense," or to present the jury a "realistic" third option. Instead, it simply stated in a footnote, without explanation, that "there was no constitutional violation under *Schad*" because the jury "did receive lesser-included instructions on robbery and intentional murder." (App. A, p. 39a n.15.) Because neither of these two options presented "a real choice," this is a holding that *Beck* would be satisfied by "just any lesser-included offense" that the Court enjoined against in *Schad*. 501 U.S. at 648.

As the trial court itself explained in charging the jury, these two lesser charges permitted the jury to find Johnson "guilty of [intentional] murder" only if it "found it wasn't done during a robbery [or attempted robbery]" or guilty of robbery only if "the robbery was committed but the deceased was not killed." (Tr. at 855.) There simply was never any question that Cantrell was killed and that he was killed during an attempted robbery. Only felony murder would have permitted the jury to find that there had been a robbery attempt in which Johnson had participated, and that that crime had led to a killing in which he had not participated. As the district court found, there was evidence to support such a jury finding. (App. B, p. 145a.) Without a felony murder charge, the jury had no realistic alternative to capital murder. It could not sensibly find that there had been no robbery attempt, nor could it find that Cantrell had not been killed in the shootout, and it also could not sensibly acquit because Johnson had clearly been involved in the robbery attempt. Absent a felony murder charge, the jury had no viable option but to convict Johnson of capital murder.

IV. THE STATE'S SUPPRESSION OF A POLICE REPORT INDICATING THAT TWO OTHER MEN "DID THE SHOOTING" AT THE CANTRELL HOME VIOLATED *BRADY* v. *MARYLAND*

Trial counsel's failure to comprehend and litigate the issue of intent was compounded by the State's failure to turn over to the defense an official Alabama Bureau of Investigation report in which Sergeant Newell, a law enforcement officer who testified at the trial, noted that an informant had told authorities that Garland and Wayne McCulloch "did the shooting" at the Cantrell home. The State's decision to withhold this exculpatory evidence clearly violated *Brady* v. *Maryland*, 373 U.S. 83 (1963), which "requires the prosecution to produce evidence that someone else may have committed the crime." *Jarrell* v. *Balkcom*, 735 F.2d 1242, 1258 (11th Cir. 1984); *see also Banks* v. *Reynolds*, 54 F.3d 1508 (10th Cir. 1995).

The Eleventh Circuit concluded that Johnson was not prejudiced by the State's failure to disclose the ABI Report because the only thing the improperly withheld report did was to "identify[] additional participants in the crime." (App. A, p. 53a.) In identifying two others who "did the shooting," however, the report excluded Johnson as one of the two participants in the killing of Cantrell. By no account were there more than two intruders who fired at Cantrell. The ABI Report also would have provided counsel with critical support in establishing that more than two people were present at the scene or nearby, and thus that proof of Johnson's presence was not proof of his guilt of murder. Because the Eleventh Circuit refused to consider whether counsel's conduct in the aggregate constituted a failure to

litigate the issue of intent, it did not examine the report in this light.[13]

When viewed in the context of Mrs. Cantrell's testimony suggesting strongly that a third man was outside the door to the carport during the shooting, the fact that the weapon found on Johnson matched none of the bullets at the scene, and the jury's 9 to 3 vote against the death penalty, the State's suppression of the ABI Report clearly "undermines confidence" in Johnson's conviction of capital murder. *Kyles*, 514 U.S. at 435.

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[13] The Eleventh Circuit suggested that no *Brady* violation occurred because the ABI Report was not admissible as substantive evidence for the defense. The duty to disclose under *Brady*, however, extends to material that can be used in questioning adverse witnesses. *United States* v. *Bagley*, 473 U.S. 667, 676 (1985). An admission by Sgt. Newell that he had information that persons other than Johnson did the shooting could have had substantial impact on the jury.

CONCLUSION

Keith Johnson stands condemned to die, convicted of capital murder by a jury that was effectively denied access to his only real defense and not properly informed of its verdict options. Decisions of this Court designed to guard against such a miscarriage were scanted by the court below. This Court should issue the writ and review that court's decision because of the importance of the questions its decision raises to the administration of the death penalty. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 01-

OFFICE

IN THE
Supreme Court of the United States

ANTHONY KEITH JOHNSON,

Petitioner,

v.

JOHN E. NAGLE, WARDEN, AND
THE ATTORNEY GENERAL OF THE STATE OF ALABAMA

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

APPENDIX

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APPENDIX A

Opinion

United States Court of Appeals

for the Eleventh Circuit

July 10, 2001

UNITED STATES COURT OF APPEALS,

ELEVENTH CIRCUIT.

ANTHONY KEITH JOHNSON,

Petitioner,

v.

JOHN E. NAGLE, WARDEN AND THE ATTORNEY GENERAL OF THE STATE OF ALABAMA,

Respondents.

No. CV-99-13198.

JULY 10, 2001

Before TJOFLAT, BLACK and MARCUS, Circuit Judges.

1165 John H. Schafer, Covington & Burling, Debra Ann Palmer, Schiff, Hardin & Waite, Washington, DC, for Petitioner-Appellant.

J. Clayton Crenshaw, Montgomery, AL, for Respondents-Appellees.

Appeal from the United States District Court for the Northern District of Alabama.

In this appeal, we consider the request for a writ of habeas corpus by Petitioner Anthony Keith Johnson, a state prisoner in Alabama. Johnson was indicted and convicted of capital murder in the 1984 shooting death of Kenneth Cantrell in Morgan County, Alabama. The state trial court

imposed a sentence of death. That judgment was later upheld on direct appeal and again on collateral attack by the Alabama Court of Criminal Appeals. In this federal habeas petition, Johnson argues that his conviction should be set aside on a variety of grounds. He contends, among other things, that his trial attorneys rendered him constitutionally ineffective assistance by choosing a flawed defense strategy. The district court conducted a hearing on Johnson's petition and subsequently issued a lengthy and well-reasoned order denying all relief. Johnson has now sought review from this Court. Having carefully reviewed the record and considered the parties' arguments, we affirm.

I.

A.

The facts presented at trial are set forth at length in the district court's order as well as the opinion on direct review of the Alabama Court of Criminal Appeals. *See Johnson v. Nagle*, 58 F.Supp.2d 1303, 1314-15 (N.D.Ala.1999); *Johnson v. State*, 521 So.2d 1006, 1007-08 (Ala.Crim.App.1986), *aff'd*, 521 So.2d 1018 (Ala.1988), *cert. denied*, 488 U.S. 876, 109 S.Ct. 193, 102 L.Ed.2d 162 (1988). On the evening of March 11, 1984, the victim, Kenneth Cantrell, and his wife were at their home in Hartselle, Alabama. The Cantrells had been in the jewelry business for 24 years and at this time were conducting the business from their home. Mrs. Cantrell received a phone call from a person who identified himself as Bill Spears from Florence, Alabama, and asked to speak to Mr. Cantrell. He told Mr. Cantrell that he would like to purchase some jewelry from him, and they arranged a meeting a short time thereafter at the Cantrell home. Mr. Cantrell was apparently suspicious of the caller, because he asked his wife to hide his wallet and bring him his .38 caliber pistol. When Mrs. Cantrell heard a

knock at the door, which led from their carport into the combined living room and dining room area of their home, she went to answer it. She observed that the man already had the storm door open, but she had to open the door to hear what he had to say.

*1166 When she opened the door she encountered a man between 45 and 50 years of age who identified himself as Bill Spears. She noticed that he held one hand behind his back, and she asked if he was concealing something. He said that he was not and showed her his hand. At the same time he motioned for another man who had been hiding in the carport to come forward. The man already at the door then grabbed Mrs. Cantrell, and the other man, wearing a blue bandana over his face and brandishing a "real shiny" gun in his hand, announced "This is a holdup."

At that point, Mrs. Cantrell broke free from the man holding her, eluded a second attempt by the first man to grab her, and fell at her husband's feet between the couch and coffee table. The first man crossed the room and positioned himself behind a couch he had overturned. The second man then entered the house and began shooting. During or just before the gunfight, Mr. Cantrell allegedly said, "Freeze ... I have got you covered," to which one of the men replied "No, we have got you, Cantrell." While on the floor, Mrs. Cantrell was able to observe that one of the men wore a pair of brown boots. She also testified that only two guns were fired during the exchange, and that the shots fired at her husband appeared to come from the direction of the second intruder. After several shots had been fired, there was a pause in the gunfire. One of the men said: "Come on in, Bubba ... we have got him." As the two men in the room made their way to the door, but before they reached it, Mr. Cantrell fired one final shot and someone said "Oh." Mrs. Cantrell then heard the sound of shuffling feet, as if one of the intruders was being assisted out of the house.

After the intruders left, Mrs. Cantrell waited a moment, looked up at her husband, noticed that he had blood all over him, and that she had blood all over her but had not been shot. She then called an ambulance and police to the scene. Mr. Cantrell sustained six gunshot wounds in the exchange, three in the right side of his chest, one in the left side of his chest, one in the back of his right arm, and one to his right middle finger. The bullets that struck him in the chest passed through his lungs and the large arteries from the heart, causing rapid death.

On the evening of March 12, 1984, the day after the murder, Johnson went to the home of David Lindsey, who was a friend, in Newell, Alabama. Johnson told Lindsey that he had been shot. When Lindsey inquired as to what had happened, Johnson stated, "Well you know how it is when you have got the habit." Johnson told Lindsey that he knew Lindsey had been to Vietnam, and asked if Lindsey knew a medic or someone who could get the bullet out. Lindsey told him that he knew no one who could do that.

At Johnson's request, Lindsey, on the morning of March 13, 1984, drove Johnson to a motel in Oxford, Alabama, to meet Gene Loyd. Loyd and Johnson were glad to see each other, and Loyd asked Johnson where he had been. Johnson replied that he "had to get the hell out of Hartselle." He said that he and some friends had gone into a place to "get some gold" and that he had been shot. According to Lindsey, Johnson stated: "I got shot, but I got off a couple of rounds, and I believe I got that son of a bitch." Lindsey returned home, where he heard that a murder had occurred in Hartselle, and he contacted law enforcement.

Johnson was arrested on March 14, 1984, at the motel where he had been taken by Lindsey. A pair of brown boots, which Johnson claimed to own, were found at the scene of the arrest. A bullet wound was discovered in his back; that

wound was 50.5 inches from the ground when Johnson was standing.

*1167 A search warrant was eventually obtained, and the bullet was surgically removed from Johnson's back. [FN1] The bullet that was removed from Appellant's back was a .38 special C.C.I. Blazer, the same kind of bullet fired by Mr. Cantrell's revolver. The bullet had the same characteristics as those test-fired from Mr. Cantrell's R.G. revolver and those found at the scene, although it was impossible to make a definite determination that Mr. Cantrell's revolver actually fired the bullet. The bullet that was removed from Johnson's back also had glass embedded in its nose. Test comparisons of the glass removed from the bullet and the glass found in the pane on the back door (through which the unaccounted-for bullet had passed) revealed that all of their physical properties matched, with no measurable discrepancies. Based upon F.B.I. statistical information, it was determined that only 3.8 out of 100 samples could have the same physical properties. [FN2]

FN1. Johnson challenged the trial court's authorization of that procedure at the time and thereafter (including in the district court in this habeas proceeding), but does not raise the issue on appeal to this Court. In any event, we find no error entitling Johnson to relief.

FN2. It was discovered that Mr. Cantrell had fired his R.G. brand revolver six times at the intruders. Most of the shots were in an upward direction from the point where he was sitting on his couch. The revolver was loaded with .38 special C.C.I. Blazer cartridges manufactured by Omark Industries. Four C.C.I. Blazer bullets were recovered from objects which

they had struck at the scene. One bullet apparently passed through the ceiling and could not be found. One bullet passed through a pane of glass on the back door 46.375 inches from the ground. A search of cardboard boxes and the wall in this bullet's path failed to reveal the bullet. The four C.C.I. Blazer bullets found at the scene had the same number of lands and grooves as the bullets test fired from Mr. Cantrell's R.G. revolver, but again, it was impossible to determine definitively that Mr. Cantrell's revolver actually fired the bullets.

B.

After the petitioner was arrested as a murder suspect, two attorneys (Propst and DiGiulian) were appointed to represent him. On March 26, 1984, Johnson was formally charged with capital murder. In June 1984, a Morgan County grand jury indicted Johnson for the intentional murder of Kenneth Cantrell during the course of a robbery, in violation of Ala.Code § 13A-5- 40. A year later, on June 20, 1985, Johnson was found guilty by a jury of capital murder as charged in the indictment.

On June 21, 1985, the jury voted nine to three to recommend that Johnson be sentenced to life imprisonment without the possibility of parole instead of death. On November 8, 1985, the trial court--having conducted the sentencing hearing required by Ala.Code § 13A-5-47--rejected the recommendation of the jury and sentenced Johnson to death. The court found two of the statutory aggravating circumstances defined at Ala.Code § 13A-5-49: (1) the capital offense was committed by a person under sentence of imprisonment, and (2) the capital offense was committed while the defendant was engaged in the commission of a robbery. The court acknowledged that there

was some potentially mitigating evidence, but ultimately ruled that the aggravating circumstances were substantial and controlling. [FN3]

FN3. Johnson does not challenge the sentencing process in this petition; his objections go instead to the underlying conviction for capital murder.

Johnson appealed to the Alabama Court of Criminal Appeals, where he was represented by newly-appointed appellate counsel (Mays). On November 25, 1986, the Alabama Court of Criminal Appeals issued a written opinion affirming the conviction *1168 and sentence. The Alabama Supreme Court affirmed the conviction and sentence on February 5, 1988, and the United States Supreme Court denied Johnson's petition for the writ of certiorari on October 3, 1988.

After the direct review process was completed, Johnson's present counsel then undertook to represent him in post-conviction proceedings. They started by seeking relief in the Alabama courts, filing on April 4, 1989, a petition under Rule 20 of the Alabama Rules of Criminal Procedure. The petition, as amended, raised a large number of claims. The Circuit Court of Morgan County twice denied the petition, only to have the Court of Criminal Appeals twice remand for the entry of express findings after a hearing. On June 17, 1991, the trial court submitted a more specific order denying the Rule 20 petition.

Johnson then appealed the denial of his petition to the Alabama Court of Criminal Appeals, which made written findings of its own and affirmed in a written opinion dated on September 18, 1992. *See Johnson v. State*, 612 So.2d 1288 (Ala.Crim.App.1992). The Alabama Supreme Court denied

Johnson's petition for the writ of certiorari on February 19, 1993, and there is no indication that Johnson sought further review from the U.S. Supreme Court.

C.

On June 7, 1993, Johnson filed this petition for habeas corpus pursuant to § 2254, asserting seven principal grounds for relief (only some of which are pursued now on appeal). In response, the State filed memoranda and introduced numerous documents and records from the various state court proceedings. The district court eventually conducted an in camera evidentiary hearing regarding communications between Johnson and his trial attorneys concerning Johnson's participation in the events surrounding the robbery and murder. Johnson's trial attorneys were also directed to file under seal materials that contained these communications. [FN4]

FN4. After seeking guidance from the parties, the district court initially determined that it could address all of the claims presented in Johnson's petition on the basis of the state court record without holding an evidentiary hearing. Subsequently, the court attempted to hold an evidentiary hearing regarding "what petitioner told counsel about the crime and his role in it in order to assess whether their strategic and tactical choices were reasonable in the light of the information known to them." On February 28, 1996, we stayed the district court's order and directed the court to conduct first an in camera hearing in order "to determine whether and to what extent appellant's communication presumptively protected by the attorney-client privilege is relevant to the specific ineffective assistance of counsel claims raised by

appellant in his habeas petition." When Johnson later sought another stay of the district court's order directing counsel to produce their notes, we denied his request, finding that "the district court's decision to order production under seal of trial counsel's notes for purposes of the in camera relevance hearing is reasonable and necessary."

In his brief, Johnson asserts that the district court "abused" our rulings by relying on the contents of these attorney-client communications in assessing the reasonableness of the strategy pursued by trial counsel. We reject that assertion. Implicit in our rulings was the expectation that, if the district court found the communications relevant to accurate resolution of Johnson's ineffectiveness arguments--and the specific communications relied upon by the district court plainly are--the privilege would not apply and the district court should consider the communications in analyzing Johnson's claim of ineffectiveness. As discussed below, such an approach is entirely proper in these kinds of cases.

According to the district court, at the hearing, Johnson's trial lawyers "made it clear that what Johnson had told his [trial] attorneys about his personal participation in the robbery and murder of Mr. Cantrell completely refuted his present attorneys' *1169 'fictionalized' account of his participation, upon which most of their present arguments are founded." 58 F.Supp.2d at 1326 n. 14. The district court found that Johnson had told his trial attorneys that he had participated in the robbery, had personally fired shots at Mr. Cantrell, and had been wounded by Mr. Cantrell. As discussed below, these statements are indeed at odds with the theory of defense advanced now by Johnson's habeas counsel.

On July 23, 1999, the district court entered an exhaustive order considering but ultimately rejecting each of Johnson's many habeas objections. In so doing, the court made various independent findings of fact, and determined as well that findings of the Alabama Court of Criminal Appeals were supported by the record. This appeal followed.

II.

Johnson filed his § 2254 petition prior to the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Therefore, this case is governed by pre-AEDPA law. *See Lindh v. Murphy*, 521 U.S. 320, 336-37, 117 S.Ct. 2059, 2068, 138 L.Ed.2d 481 (1997). Under pre-AEDPA law, we review the denial of Johnson's § 2254 petition, and the district court's subsidiary legal conclusions, de novo. *See, e.g., Yeck v. Goodwin*, 985 F.2d 538, 540 (11th Cir.1993); *Oliver v. Wainwright*, 782 F.2d 1521, 1524 (11th Cir.1986). District court findings of fact are subject to the clearly erroneous standard. *See Williams v. Turpin*, 87 F.3d 1204, 1209 (11th Cir.1996). The state court's factual findings are generally entitled to a presumption of correctness and may be ignored only if the petitioner shows by clear and convincing evidence that the state court's determination was not " 'fairly supported by the record.' " *Griffin v. Wainwright*, 760 F.2d 1505, 1511 (11th Cir.1985) (quoting pre-AEDPA § 2254(d)). This presumption is equally applicable to state appellate court findings of fact. *See, e.g., Sumner v. Mata*, 449 U.S. 539, 549, 101 S.Ct. 764, 770, 66 L.Ed.2d 722 (1981).

Johnson asserts multiple grounds for granting his § 2254 petition. His principal arguments are the following: (1) there was insufficient evidence to convict him of capital murder, especially on the issue of his intent to kill; (2) his trial attorneys provided ineffective assistance of counsel (i) by adopting an unreasonable defense strategy that failed to

challenge the State's proof of intent; (ii) by failing to request a jury instruction on felony murder; (iii) by making improper remarks during closing argument and also failing to object to improper remarks by the prosecutor; and (iv) by inadequately cross-examining Lindsey and failing to call witnesses who might have impeached Lindsey's testimony; (3) his appellate lawyer provided ineffective assistance of counsel; (4) the State committed a *Brady* violation by suppressing material that could have been used to impeach witnesses unfavorable to the defense; and (5) the trial court's "reasonable doubt" instruction impermissibly lowered the State's burden of proof below that required by the Constitution. We address these arguments in turn, and find each of them to be without merit. [FN5]

FN5. Arguments by Johnson not specifically addressed in this opinion are likewise without merit.

III.

Johnson's first argument for relief is that there was insufficient evidence to prove him guilty of capital murder beyond a reasonable doubt. In particular, Johnson contends that there was insufficient evidence of his specific intent to kill. Before addressing this argument, however, *1170 we must consider whether it has been preserved for federal court review. We agree with the district court that this claim has been procedurally defaulted. We also agree that this argument fails on its merits.

A.

We turn initially to the question of procedural default. To obtain a writ of habeas corpus under § 2254, a petitioner must not have procedurally defaulted his federal claims in the state courts. *See, e.g., Wainwright v. Sykes*, 433 U.S. 72, 82-85, 97 S.Ct. 2497, 2504-06, 53 L.Ed.2d 594 (1977). "Federal review of a petitioner's claim is barred by the procedural default doctrine if the last state court to review the claim states clearly and expressly that its judgment rests on a procedural bar, and that bar provides an adequate and independent state ground for denying relief." *Johnson v. Singletary*, 938 F.2d 1166, 1173 (11th Cir.1991) (en banc) (citing *Harris v. Reed*, 489 U.S. 255, 263, 109 S.Ct. 1038, 1043, 103 L.Ed.2d 308 (1989)).

The Alabama Court of Criminal Appeals, considering Johnson's appeal from the denial of his state post-conviction petition, expressly found that Johnson's sufficiency of the evidence challenge was procedurally barred as a matter of Alabama law to the extent it "could have been but was not raised on [direct] appeal." *Johnson v. State*, 612 So.2d at 1292. The district court found that the particular insufficiency of the evidence claim asserted by Johnson in this proceeding could have been, but was not, raised on direct appeal, and therefore, by virtue of the Alabama Court of Criminal Appeal's decision, is procedurally barred from federal court review. We agree. *See Chandler v. Moore*, 240 F.3d 907, 912 (11th Cir.2001); *Singletary*, 938 F.2d at 1173.

Johnson insists that he did argue insufficiency of the evidence on direct appeal. But while state appellate counsel attacked the sufficiency of the evidence regarding Johnson's presence at the scene, there was no appeal on the separate and distinct issue of whether there was sufficient evidence that Johnson had the specific intent to kill required under Alabama's capital murder law. Johnson does not contend that such an argument was advanced (indeed, appellate

counsel's failure to advance that argument is one of the reasons Johnson now claims ineffective assistance of counsel), and there is no indication that the Alabama Court of Criminal Appeals, in its ruling on Johnson's state habeas petition, thought that such an argument was among those raised or addressed on direct appeal. *See* 612 So.2d at 1292. This is not a situation where, to use Johnson's words, a claim was presented fairly but "inartfully" on direct appeal; rather, the sufficiency of the evidence argument advanced by Johnson on direct appeal was totally different from that advanced in this federal proceeding. Insufficiency of the evidence is simply too broad and malleable an objection to hold, in these circumstances at least, that a direct appeal in state court challenging the sufficiency of the evidence on one theory is enough to preserve for federal habeas review a challenge to the adequacy of proof on a factually and legally distinct theory never fairly presented to the state courts. *Cf. Hart v. Estelle*, 634 F.2d 987, 989 (5th Cir.1981) (exhaustion of state remedies requirement not satisfied where the petitioner "technically asserted the same constitutional deficiency and the same facts" in the federal proceeding, but did so "in support of a different legal theory"). We therefore find that this claim has been procedurally defaulted. [FN6]

FN6. Johnson cites a treatise for the proposition that "procedural default 'has not occurred for purposes of federal habeas review' where state law bars a petitioner from presenting a claim in state post-conviction proceedings that has previously been raised on direct appeal." Pet. Br. at 54 n. 40. That is not the problem here, however, because--as we discuss--Johnson's current sufficiency of the evidence challenge was not raised on direct appeal, and hence it was not among the *separate* group of sufficiency of the evidence claims that the Alabama Court of

Criminal Appeals ruled in the post-conviction proceeding were barred because they had already been raised on direct appeal. *See* 612 So.2d at 1292 ("We hold that to the extent this [alleged insufficiency of proof] claim constitutes the same insufficiency-of-evidence issue asserted on direct appeal, this claim is procedurally barred from review under [Rule 20.2(a)(4)] because it was raised or addressed on appeal. We likewise hold that to the extent that this claim differs from the insufficiency of the evidence issue asserted on direct appeal, this claim is procedurally barred from review under [Rule 20.2(a)(5)] because it could have been but was not raised on appeal."). Johnson's other assertion that Alabama fails to adhere to its own default rules--*see Blount v. State*, 572 So.2d 498 (Ala.Crim.App.1990) and *Falkner v. State*, 586 So.2d 39 (Ala.Crim.App.1991)--is unpersuasive. The exceptions applied in these decisions are not as broad as Johnson claims, and do not establish that Alabama would not regularly apply its default rules in the situation we have here.

*1171 If a petitioner has procedurally defaulted a federal habeas claim, he may be nevertheless heard on that claim if he can show "cause" for the procedural default and "prejudice" attributable thereto. *See Murray v. Carrier*, 477 U.S. 478, 485, 106 S.Ct. 2639, 2644, 91 L.Ed.2d 397 (1986). To show cause, a petitioner must prove that "some objective factor external to the defense impeded counsel's efforts" to raise the claim previously. *Id.* at 488, 106 S.Ct. at 2645. Once cause is proved, a petitioner also must prove prejudice. He must show "not merely that the errors at his trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *United States v. Frady*,

456 U.S. 152, 170, 102 S.Ct. 1584, 1596, 71 L.Ed.2d 816 (1982) (emphasis in original).

If a petitioner cannot show cause, he may still survive a procedural bar by proving that the failure to hear the merits of his claim would endorse a fundamental miscarriage of justice. *See Murray*, 477 U.S. at 495, 106 S.Ct. at 2649. This exception is exceedingly narrow in scope, as it concerns a petitioner's "actual" innocence rather than his "legal" innocence. *See Calderon v. Thompson*, 523 U.S. 538, 559, 118 S.Ct. 1489, 1502-03, 140 L.Ed.2d 728 (1998); *Murray*, 477 U.S. at 495-96, 106 S.Ct. at 2649 (explaining that a "fundamental miscarriage of justice" occurs "in an extraordinary case, where a constitutional violation has resulted in the conviction of someone who is actually innocent"). To meet this standard, a petitioner must "show that it is more likely than not that no reasonable juror would have convicted him" of the underlying offense. *Schlup v. Delo*, 513 U.S. 298, 327, 115 S.Ct. 851, 867, 130 L.Ed.2d 808 (1995). In addition, " '[t]o be credible,' a claim of actual innocence must be based on reliable evidence not presented at trial." *Calderon*, 523 U.S. at 559, 118 S.Ct. at 1502-03 (quoting *Schlup*, 513 U.S. at 324, 115 S.Ct. at 865) (explaining that "[g]iven the rarity of such evidence, in virtually every case, the allegation of actual innocence has been summarily rejected" (internal quotation marks omitted)).

Neither exception to the procedural bar rule applies in this case. Johnson's only "cause and prejudice" argument stems from his appellate counsel's purportedly ineffective assistance in failing to litigate on appeal the intent issue. As discussed below, however, we do not find appellate counsel to have been constitutionally ineffective. *1172 Nor, as discussed below, does Johnson show "actual innocence." Johnson bases his objection on a new theory of defense, not newly-discovered evidence. He has not come forward with any new evidence in support of his petition. In any event, we

cannot say that it was more likely than not that no reasonable juror would have convicted Johnson of capital murder.

B.

Indeed, on the merits, we agree with the district court that the evidence at trial was sufficient to sustain Johnson's capital murder conviction. The question we ask is very limited: whether, after reviewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the petitioner guilty beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 313, 99 S.Ct. 2781, 2785, 61 L.Ed.2d 560 (1979); *Martin v. Alabama*, 730 F.2d 721, 724 (11th Cir.1984). Although each element of the offense must be established beyond a reasonable doubt, *see Bishop v. Kelso*, 914 F.2d 1468, 1470 (11th Cir.1990) (citing *Jackson*, 443 U.S. at 316, 99 S.Ct. at 2787), the State is not required to rule out every hypothesis except that of the guilt of the defendant, *see Jackson*, 443 U.S. at 326, 99 S.Ct. at 2792-93; *Martin*, 730 F.2d at 724. When the record reflects facts that support conflicting inferences, there is a presumption that the jury resolved those conflicts in favor of the prosecution and against the defendant. In other words, federal courts must defer to the judgment of the jury in assigning credibility to the witnesses and in weighing the evidence. *See Jackson*, 443 U.S. at 326, 99 S.Ct. at 2793; *Wilcox v. Ford*, 813 F.2d 1140, 1146 (11th Cir.1987).

In this proceeding, Johnson's sufficiency challenge revolves around a so-called "third man" defense. Specifically, Johnson contends that the trial evidence indicates that he was not one of the two robbers who shot at Cantrell, but rather was a "third" man who participated in the robbery but not in Cantrell's shooting death. As this theory goes, Johnson entered the Cantrell house during a lull in the shooting just in time to be caught in the back by the dying Mr. Cantrell's last shot.

This theory -- which was not advanced by Johnson's trial or appellate counsel in state court--attempts to build upon apparent confusion in the testimony of Mrs. Cantrell, the only surviving eyewitness to the shooting, as well as a nuance in Alabama's capital murder scheme. Although Alabama law does identify robbery as one of the circumstances that may elevate a murder to a capital offense, *see* Ala.Code § 13A-5-40(a)(2), mere participation in a robbery that leads to a killing is not sufficient for a capital conviction. Alabama's capital murder statute applies only when the defendant has specific intent to kill, and thereby is guilty of an intentional murder. *See Ex parte Murry*, 455 So.2d 72, 74 (Ala.1984); *Lewis v. State*, 456 So.2d 413, 416 (Ala.Crim.App.1984) (stating that "no defendant is guilty of a capital offense unless he had an intent to kill, and that intent to kill cannot be supplied by the felony murder doctrine").

The State has acknowledged that Mr. Cantrell was actually killed by the unidentified "first" man rather than by Johnson. That acknowledgment does not relieve Johnson of liability, however. Johnson may still be liable for capital murder upon proof of complicity in an intentional murder carried out by another. This theory of liability requires more than proof of participation in a robbery; it also requires proof that Johnson, with an intent to kill, aided another in the killing Mr. *1173 Cantrell. *See Ex parte Raines*, 429 So.2d 1111, 1112-13 (Ala.1982). [FN7]

FN7. Johnson contends that the jury did not convict him under this theory. He contends that the indictment may be read as charging him with capital murder only as a principal (rather than an accomplice) in the killing of Mr. Cantrell. Johnson maintains that upholding his conviction on an accomplice or "complicity" theory would invade the province of the

jury, apparently because the jury returned a verdict convicting Johnson of capital murder "as described in the indictment." We disagree with Johnson's reading of the indictment as well as his understanding of the law. There was no requirement that the State specifically allege Johnson's liability for Mr. Cantrell's death as an accomplice rather than as a principal; it was enough that the State alleged his liability for capital murder. Nor is there any requirement that the jury make a specific "finding" that the State proved Johnson guilty as an accomplice as opposed to or in lieu of finding him guilty as a principal. Finally, the allegations of the indictment accommodate a "complicity" theory.

At trial, the state offered evidence indicating that Johnson possessed the intent required under Alabama's capital murder statute. First, the State put Lindsey on the stand to testify that Johnson admitted shooting a robbery victim in Hartselle. Second, the State attempted to identify Johnson as the second robber in the Cantrell home through physical evidence, and then put on testimony from Mrs. Cantrell that this robber had shot at her husband. The Alabama Court of Criminal Appeals observed in post-conviction proceedings that "[w]hile the shots of the second 'masked' robber were not the shots that killed the victim, there was no reasonable basis for the jury to doubt that the second robber had the intent to kill, attempted to kill, and actively participated in the killing." *Johnson v. State*, 612 So.2d at 1298.

Johnson's "third man" theory turns on the notion that the evidence at trial could be interpreted to indicate that there were *three* robbers on the scene, and that Johnson was not the second but the third man to enter the Cantrell home, and hence was not one of the two men who allegedly shot at Mr. Cantrell. The State's main argument on this point was that

there were two men at the scene, two men shot at Mr. Cantrell, Johnson was at the scene, and accordingly Johnson must have been the second man. Johnson counters that while the State may have had evidence that he was present at the scene, it had little solid evidence pointing to him as the second man. According to Johnson, a properly- instructed jury would have concluded that he did not participate in the shoot-out with Cantrell, found evidence of intentional murder lacking, and opted instead for felony murder, a non-capital offense.

Johnson's theory relies almost entirely on apparent confusion in portions of Mrs. Cantrell's trial testimony. As fairly described by the district court, *see* 58 F.Supp.2d at 1314-15, Mrs. Cantrell's testimony was essentially as follows. Two intruders pushed past her into the house. The first man turned over a couch in the living room and took up a position behind it. Mrs. Cantrell fell to the floor at her husband's feet and was unable to see much of anything after that point. After a brief verbal exchange between her husband and the intruders, the second man opened fire. A barrage of shots was exchanged, followed by quiet. The first man said "come on in Bubba, I have got him." Just after that, Mr. Cantrell got off one last shot. Mrs. Cantrell heard a man say "Oh!," then heard shuffling as if "they were trying to help him out."

Mrs. Cantrell continued:

> A: It didn't take them long ... to start moving over further towards the door.
>
> Q: Further towards the door?
>
> A: That is right.
>
> *1174 Q: So neither one of them was at the door when your husband fired the last shot?

A: No, they wasn't.

Q: They were not?

A. No.

Id. at 1331. Mrs. Cantrell speculated that the men "were probably going through things, looking for things." *Id.*

According to Johnson, this portion of Mrs. Cantrell's testimony is critical because she placed the two intruders away from the door at the moment when the last shot was fired and one of the intruders was hit. This is important, Johnson claims, because the State's evidence that Johnson was present at the scene was based largely on a bullet which allegedly went through the door and hit him. Thus, says Johnson, if both Mrs. Cantrell's testimony and the State's physical evidence were to be believed, there must have been three robbers rather than two, and Johnson could not have been the second man. [FN3] As the district court explained, "Johnson's story would go something like this. He and several others went to rob the Cantrells. He waited outside while two other men went in. They shot Cantrell, and thinking the fight was over called Johnson in. As he walked in, he was hit in the right side of his back by Cantrell's dying shot." 58 F.Supp.2d at 1331. Under this scenario, Johnson was the "third man," did not participate in the shooting, and lacks the requisite intent to kill required for capital murder.

FN8. Johnson also insists that additional evidence could be drawn upon to support this conclusion, including Lindsey's testimony that Johnson had gone with "some friends" to get money; the position of the bullet wound on the right side of Johnson's back, a fact he says was consistent with coming in the door,

not going out; and the perceived sequence and timing of the lull in shooting, the first man's direction to "come on in," and Cantrell's last shot. This evidence adds little to his argument, however; the "third man" theory, to the extent it is viable at all, turns on Mrs. Cantrell's trial testimony.

We agree with the district court that the balance of the trial evidence, viewed in a light most favorable to the prosecution, was sufficient to permit a rational trier of fact to find Johnson guilty of the essential elements of capital murder beyond a reasonable doubt. The balance of the evidence points to two intruders rather than three, with Johnson as the second man.

First, the evidence presented at trial was more than adequate to prove that Johnson was present at the scene and aided his associate in the killing. Evidence at the scene indicated that a bullet had been fired by the victim and had passed through a pane of glass in the carport door, only to disappear. A bullet of the type used by the victim, and with markings matching the type of gun used by the victim, was recovered from Johnson's back. The location of the bullet wound was consistent with the trajectory of the missing bullet, and fragments of glass found in the head of that bullet matched the physical characteristics of the window pane through which the shot had passed. This evidence was sufficient to allow a reasonable juror to infer beyond a reasonable doubt that Johnson was present during the gunfight which led to Mr. Cantrell's death.

Second, there was sufficient evidence to establish Johnson's intent to kill, i.e., that he was the second man. The physical evidence indicated that an active gun battle was waged between the victim and two intruders. A number of shots from both sides passed through the carport door, indicating that one of the intruders must have been firing from behind the door during part of the gunfight. The fact

that Johnson was struck by a bullet passing *1175 through this door allowed the jury to infer that he was the shooter behind the door. Johnson's wound location in his right mid-back was likewise consistent with the notion that he had taken up a position behind the door during the fight and from there shot at Mr. Cantrell.

Moreover, Lindsey testified that Johnson visited his home the day after Mr. Cantrell was murdered. According to Lindsey, Johnson had with him a "shiny" .357 Magnum matching the description of the gun carried by one of Mr. Cantrell's killers. [FN9] The next morning, Lindsey drove Johnson to a motel in Oxford, Alabama, where they met some of Johnson's friends. Lindsey testified that Johnson told them that he "had to get the hell out of Hartselle," and that he and others had gone into a place to get some gold and that his buddy had been shot. According to Lindsey, Johnson also stated: "I got shot, but I got off a couple of rounds, and I believe I got that son of a bitch." The jury was entitled to believe, and presumably did believe, Lindsey's testimony. The record therefore contains what amounts to an admission by Johnson that he participated in an intentional killing. In light of the other evidence, a rational jury could conclude that it was Mr. Cantrell's murder which Johnson was describing.

FN9. This testimony was partially corroborated by the introduction at trial of a nickel-plated Ruger .357 Magnum found in Johnson's possession a few days after the killing. Johnson's gun, when found, had only three rounds in it, consistent with the three rounds apparently fired by the intruder near the carport door.

In the end, virtually the only evidence arguably supporting the "third man" theory was the snippet of Mrs.

Cantrell's testimony highlighted now by Johnson. But a reasonable jury could easily have downplayed any brief inconsistencies in Mrs. Cantrell's testimony, and based its conviction on the balance of the evidence pointing powerfully to Johnson as one of two men who shot at the victim. On this record, the State sufficiently proved that Johnson formed the requisite intent to kill for capital murder, and that he intended to participate, and did participate in Cantrell's intentional killing. Giving the jury's verdict the deference it is due under *Jackson*, Johnson is not entitled to relief on the ground that the evidence was insufficient to convict him of capital murder.

IV.

Johnson next argues that he is entitled to relief because his trial counsel were constitutionally ineffective. Most of Johnson's ineffectiveness arguments center on trial errors that Johnson attributes to his lawyers' lack of understanding of Alabama law regarding the difference between capital and felony murder, and his lawyers' related failure to recognize the possibilities of a "third man" defense. His lawyers' purported errors include: (1) failing to argue that Johnson was not a participant in the shooting, but was instead a "third man"; (2) failing to argue that there was insufficient evidence of Johnson's alleged intent to kill Mr. Cantrell; (3) failing to request a felony murder jury instruction; (4) failing to object to the prosecutor's closing argument; and (5) improperly suggesting during their own closing argument that Johnson would be guilty of capital murder if he were merely present at the robbery and murder of Mr. Cantrell. We address these objections in turn.

A.

The standard for ineffective assistance of counsel is well-settled. "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant *1176 by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Williams v. Taylor*, 529 U.S. 362, 390, 120 S.Ct. 1495, 1511, 146 L.Ed.2d 389 (2000) (internal quotation marks omitted) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984)); *accord*, *Chandler v. United States*, 218 F.3d 1305, 1312-1313 (11th Cir.2000) (en banc), *cert. denied*, --- U.S. ----, 121 S.Ct. 1217, 149 L.Ed.2d 129 (2001). The petitioner bears the burden of proof on the "performance" prong as well as the "prejudice" prong of a *Strickland* claim, and both prongs must be proved to prevail. The *Strickland* test is not easily met; as we have said, "the cases in which habeas petitioners can properly prevail on the ground of ineffective assistance of counsel are few and far between.' " *Waters v. Thomas*, 46 F.3d 1506, 1511 (11th Cir.1995) (en banc) (citation omitted).

To establish ineffective performance, a "petitioner must show that 'counsel's representation fell below an objective standard of reasonableness.'" *Darden v. Wainwright*, 477 U.S. 168, 184, 106 S.Ct. 2464, 2473, 91 L.Ed.2d 144 (1986) (quoting *Strickland*, 466 U.S. at 668, 104 S.Ct. at 2065). This Circuit reviews a lawyer's conduct under the "performance" prong with considerable deference, giving lawyers the benefit of the doubt for "heat of the battle" tactical decisions. *See Mills v. Singletary*, 161 F.3d 1273, 1285-6 (11th Cir.1998) (noting that *Strickland* performance

review is a "deferential review of all of the circumstances from the perspective of counsel at the time of the alleged errors"); *see also* *Waters*, 46 F.3d at 1518 ("The test for ineffectiveness is not whether counsel could have done more; perfection is not required. Nor is the test whether the best criminal defense attorneys might have done more. Instead the test is ... whether what they did was within the 'wide range of reasonable professional assistance.' " (citation omitted)); *Rogers v. Zant*, 13 F.3d 384, 386 (11th Cir.1994) (stating that "[w]hen reviewing whether an attorney is ineffective, courts should always presume strongly that counsel's performance was reasonable and adequate" (internal quotation marks omitted)).

This Court, sitting en banc, recently discussed this inquiry at length in *Chandler*:

> The standard for counsel's performance is reasonableness under prevailing professional norms. The purpose of ineffectiveness review is not to grade counsel's performance.... To state the obvious: the trial lawyers, in every case, could have done something more or something different. So, omissions are inevitable. But, the issue is not what is possible or what is prudent or appropriate, but only what is constitutionally compelled.... The petitioner must establish that particular and identified acts or omissions of counsel were outside the wide range of professionally competent assistance.
>
> Courts must indulge [the] strong presumption that counsel's performance was reasonable and that counsel made all significant decisions in the exercise of

> reasonable professional judgment. Thus, counsel cannot be adjudged incompetent for performing in a particular way in a case, as long as the approach taken might be considered sound trial strategy. Given the strong presumption in favor of competence, the petitioner's burden of persuasion--though the presumption is not insurmountable--is a heavy one.... [B]ecause counsel's conduct is presumed reasonable, for a petitioner to show that the conduct was unreasonable, a petitioner must establish that no competent counsel would *1177 have taken the action that his counsel did take....
>
> In reviewing counsel's performance, a court must avoid using the distorting effects of hindsight and must evaluate the reasonableness of counsel's performance from counsel's perspective at the time. [I]t is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.

218 F.3d at 1313-1316 (citations and internal quotation marks omitted).

Likewise, the "prejudice" prong is difficult to meet. To establish prejudice, a petitioner must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068. A "reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* A finding of prejudice requires proof of " 'unprofessional errors' so egregious 'that the trial was rendered unfair and the verdict rendered suspect.'" *Eddmonds v. Peters*, 93 F.3d 1307, 1313

(7th Cir.1996) (quoting *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S.Ct. 2574, 2582, 91 L.Ed.2d 305 (1986)). As we recently explained, "habeas petitioners must affirmatively prove prejudice because '[a]ttorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial.' '[T]hat the error had some conceivable effect on the outcome of the proceeding' is insufficient to show prejudice." *Gilreath v. Head*, 234 F.3d 547, 551 (11th Cir.2000) (quoting *Strickland*).

B.

Johnson contends that his trial attorneys were ineffective by failing to attack the State's showing on intent and by failing to advance the "third man" theory. Johnson's argument starts from the premise that trial counsel did not understand the intent element of a capital murder charge, and therefore failed to recognize the significance of Mrs. Cantrell's trial testimony. This factual allegation also underlies Johnson's broader claim that trial counsel unreasonably advanced a flimsy defense--that he was not present at the scene of the crime--rather than a stronger defense based upon his lack of intent to kill and his non-participation in the murder. The Alabama Court of Criminal Appeals explicitly found that "[t]rial counsel [were] aware that intent to kill was a required element of the capital offense." *Johnson v. State*, 612 So.2d at 1298. That court also found that "counsel made a reasoned, strategic decision not to argue ... that Johnson was present but did not intend that the victim be killed" based upon a desire to avoid making alternative arguments to the jury as well as a "judgment that, as a practical matter, there was little or no chance that the jury would fail to find ... intent to kill if [it] concluded that [Johnson] had been at the scene." *Id.* at 1296. [FN10]

FN10. Johnson, as noted above, contends that his trial counsel did not understand the elements of Alabama's capital murder scheme, and in particular did not understand the intent requirement. The district court, however, ruled that the record contains sufficient evidence to support a finding that at least one of Johnson's trial attorneys, DiGiulian, knew of the intent and participation requirements of an accomplice capital murder theory. The district court did conclude that the record would not support a finding that Johnson's trial counsel recognized the potential significance of Mrs. Cantrell's unclear testimony and what that testimony might mean for the intent requirement. But our inquiry is an objective one, *see, e.g., Chandler*, 218 F.3d at 1315-16, so the primary issue is not how Johnson's attorneys came to pursue the course that they did, but rather whether the course they actually pursued was one that "no competent counsel would have taken." *Id.* at 1315.

*1178 Johnson fails to meet his heavy burden of proving that his trial counsel performed unreasonably by pursuing the strategy that they did. On this record, the strategic choices made by trial counsel were reasonable and constitutionally adequate in the circumstances.

In formulating their strategy before trial, Johnson's lawyers were aware of statements by Johnson himself that he was the second man involved in the robbery and that he had shot at Mr. Cantrell. [FN11] Johnson's now- preferred "third man" defense, therefore, was not compatible with the information he conveyed to his lawyers at the time. *See Williamson v. Moore*, 221 F.3d 1177, 1180 (11th Cir.2000) (counsel not ineffective in choosing particular defense

strategy in capital case where reasonable counsel would have determined that petitioner's alternative theory "was inconsistent with Petitioner's own description of the killing").

> FN11. As noted above, Johnson's trial attorneys testified and introduced notes pertaining to their decision to argue that Johnson was not present during the offense.

Notably, Johnson does not, and cannot, argue that these communications with his trial counsel are protected in this context by the attorney-client privilege. As we have explained, a party "waives its attorney-client privilege when it injects into this litigation an issue that requires testimony from its attorneys or testimony concerning the reasonableness of its attorneys' conduct." *GAB Bus. Servs., Inc. v. Syndicate 627*, 809 F.2d 755, 762 (11th Cir.1987). By alleging that his attorneys provided ineffective assistance of counsel in their choice of a defense strategy, Johnson put at issue--and thereby waived--any privilege that might apply to the contents of his conversations with those attorneys to the extent those conversations bore on his attorneys' strategic choices.

In *Laughner v. United States*, 373 F.2d 326 (5th Cir.1967), we rejected the argument of a § 2255 petitioner who asserted that his trial counsel should not have been permitted to testify regarding their confidential communications, even though the petitioner put those conversations at issue by attacking the attorney's performance. The petitioner sought to vacate his conviction by arguing that his attorney provided inadequate representation. The district court, in accordance with this Court's instructions, conducted a hearing at which it heard testimony from the attorney who represented the petitioner at

the time of his conviction. On the basis of that testimony, the court denied the § 2255 motion. We affirmed, and rejected the petitioner's claim of a violation of the attorney-client privilege:

> We are met with the remarkable contention that appellant's rights were infringed upon by reason of the fact that the attorney he charged with failure to represent him adequately at his arraignment and sentencing was called as a witness by the government and permitted by the court to testify in this post- conviction proceeding with respect to the factual issues raised by appellant's motion. Having demanded and obtained a factual judicial inquiry into his claim that the attorney appointed to render him the assistance of counsel for his defense failed to discharge his responsibilities properly, appellant now proposes to invoke the privilege accorded confidential communications between an attorney and his client to eliminate the one source of evidence likely to contradict his allegations. We are unable to subscribe to this proposition. The privilege is not an inviolable seal upon the attorney's *1179 lips. It may be waived by the client; and where, as here, the client alleges a breach of duty to him by the attorney, we have not the slightest scruple about deciding that he thereby waives the privilege as to all communications relevant to that issue. The rule that a client waives his privilege by attacking the attorney's performance of his duties seems to have been adopted unanimously by those courts which have dealt with the question.... There is no contention nor any indication in the record that the testimony elicited from the attorney in this case exceeded the scope of that waiver. Consequently, appellant's claim that his privilege was violated is baseless.

Id. at 327 & n. 1 (citations omitted). *Laughner* is the law of this Circuit and has been applied in subsequent decisions from this Court. *See Crutchfield v. Wainwright*, 803 F.2d

1103, 1121 (11th Cir.1986) (en banc) (Edmondson, J., concurring) (noting in § 2254 proceeding that "[a]lthough the attorney-client privilege, in particular, and attorney-client confidentiality, in general, are important concerns due genuine deference, courts have never treated them as inviolable. When a defendant has challenged his conviction by asserting an issue that makes privileged communications relevant, he waives the privilege in respect to those communications."); *Smith v. Estelle*, 527 F.2d 430, 434 n.9 (5th Cir.1976) (stating that "[n]otwithstanding the fact that counsel's decision to have his client take the stand may have involved communication with his client, [petitioner] would not be able to invoke the attorney-client privilege on remand in a post-conviction case" where petitioner alleged that he would not have testified at his trial but for the admission of a constitutionally invalid confession).

Simply put, when a habeas petitioner such as Johnson launches an attack on the reasonableness of his attorney's strategy in conjunction with a claim of ineffective assistance of counsel, he puts at issue his communications with counsel relating to those strategic choices. As *Strickland* itself emphasizes, the "reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, ... on information supplied by the defendant ... [and] ... inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's ... litigation decisions." 466 U.S. at 691, 104 S.Ct. at 2066; *see also Chandler*, 218 F.3d at 1318-19 ("Because the reasonableness of counsel's acts ... depends critically upon information supplied by the [petitioner] or the [petitioner]'s own statements or actions, evidence of a petitioner's statements and acts in dealing with counsel is highly relevant to ineffective assistance claims." (citations and internal quotation marks omitted)). Although the precise

boundaries of the waiver will vary from case to case, and in many instances will require careful evaluation by the district court, there should be no confusion that a habeas petitioner alleging that his counsel made unreasonable strategic decisions waives any claim of privilege over the contents of communications with counsel relevant to assessing the reasonableness of those decisions in the circumstances. The importance of that rule to proper resolution of a § 2554 proceeding is amply illustrated by this case--the communications between Johnson and his trial counsel clearly reveal the incompatibility between what Johnson told his lawyers at the time and the theory of defense that his present lawyers insist their predecessors should have advanced.

Not only would a "third man" theory have been incompatible with the information supplied by Johnson to his counsel at the time, it would have had little foundation *1180 in other evidence available to counsel before the start of the trial. Mrs. Cantrell's pretrial testimony made no suggestion of a "third man." There was no evidence from the preliminary hearing, or information gleaned from defense counsel's pretrial investigation, reasonably suggesting that a "third man" defense would be successful. Indeed, the available evidence supported a two-shooter robbery theory. Accordingly, trial counsel had little if any basis to pursue a "third man" theory. And without the "third man" theory, no plausible challenge could be made to the State's proof of intent, as the second man participated in a shoot-out and clearly displayed an intent to help his partner kill Mr. Cantrell.

Given the evidence available at the time and Johnson's own admissions, the strategy actually chosen by trial counsel--a "Johnson was not there" defense--was reasonable. Although the evidence tying Johnson to the scene of the crime was persuasive, it still was all circumstantial and not wholly iron- clad. Counsel knew that

no eyewitness could identify Johnson as being present at the crime scene. The .357 magnum handgun that was found with Johnson at the motel in Oxford was not clearly matched to any of the bullets at the crime scene. The bullet found in Johnson's back could not itself be traced definitively to Mr. Cantrell's gun. A hair found in a brown cap allegedly worn by the Johnson during the robbery and murder did not match Johnson's hair. And boots allegedly worn by Johnson during the shooting did not contain glass fragments from a shattered glass door pane. [FN12] In short, Johnson's trial attorneys had a basis to argue that a sufficient link could not be forged between Johnson and the crime. Their decision to pursue a "Johnson was not there" defense was within the range of professionally competent assistance.

> FN12. The strongest evidence linking Johnson to the crime scene, glass found in the nose of the bullet removed from Johnson's back which shared the same refractive index as one of the shattered door panes at the Cantrell house, was not revealed to counsel until the eve of trial. Even that evidence, however, did not make unreasonable a defense strategy based on Johnson's absence from the scene.

Johnson nevertheless contends that, whatever the reasonableness of his lawyers' pretrial strategy, that strategy had to change once Mrs. Cantrell offered her testimony at trial. As noted above, apparent confusion in Mrs. Cantrell's testimony arguably could suggest that Johnson was not one of the two shooters, but merely a third robber. Johnson contends that Mrs. Cantrell's testimony created an opening to challenge the State's evidence on intent, and argues that it was unreasonable for his counsel not to have exploited this opportunity.

We are not persuaded that Johnson's trial attorneys provided professionally incompetent assistance by failing to alter their reasonable strategy in favor of pursuing a "third man" defense. First, the relevant portion of Mrs. Cantrell's testimony was very brief, not altogether clear, and at odds with other portions of her account of the incident. We cannot say that, under the circumstances, every reasonably competent attorney would have realized or attempted to take advantage of the potential significance of this portion of Mrs. Cantrell's testimony. Second, counsel were committed to the "Johnson was not there" defense, and to shift gears and argue in the alternative that Johnson *was* there, but only as the "third man," would have been risky. [FN13] The district court found that counsel had already presented to the jury the theory Johnson was not present at the *1181 robbery. *See* 58 F.Supp.2d at 1344 (citing transcript of evidentiary hearing). That theory, as explained above, was reasonable. As we have explained in similar circumstances, "[a]lthough inconsistent and alternative defenses may be raised, competent trial counsel know that reasonableness is absolutely mandatory if one hopes to achieve credibility with the jury." *Harich v. Dugger*, 844 F.2d 1464, 1470 (11th Cir.1988). To argue in the alternative that if Johnson was there, he was a "third man" and not one of the two shooters, might well have undercut the credibility of Johnson's lawyers with the jury.

FN13. Johnson's attorneys testified that they felt the presentation of alternative theories would have been mistaken.

Finally, there was little meaningful evidence beyond the highlighted portion of Mrs. Cantrell's testimony to aid a "third man" argument. Johnson himself could not have taken

the stand, in light of his contrary admissions to his counsel. There remained Lindsey's testimony that Johnson had admitted to firing at Mr. Cantrell during the robbery. In addition, the physical evidence including the bullet holes in the carport door suggested that the second shooter was behind the door and not where Mrs. Cantrell seemingly indicated during her trial testimony. As the district court observed, even Mrs. Cantrell's trial testimony indicated, with the exception of a few inconsistencies, that two intruders were involved in the crime and that both participated in the murder of her husband. Given all of these circumstances, we do not find it performance error that counsel did not aggressively pursue a "third man" theory or other intent-related defenses during trial. *See Waters*, 46 F.3d at 1512 (performance inquiry "has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial.").

C.

Johnson next contends that his trial counsel were ineffective because they did not request an instruction on the offense of felony murder. According to Johnson, with the option of a felony murder conviction, the jury might have acquitted on the capital murder charge to spare Johnson the death penalty if it had doubts that he shot at Mr. Cantrell. The district court did not decide whether this failure to request a felony murder instruction was performance error, finding instead no prejudice because Johnson failed to show a reasonable probability that the jury would have returned a different verdict on the capital murder charge if they had been presented with a felony murder jury instruction. [FN14] We agree with that analysis.

FN14. Johnson's trial lawyers testified that they did not consider whether to request a felony murder instruction.

Relevant to this legal question are two Supreme Court decisions, *Beck v. Alabama*, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980), and *Schad v. Arizona*, 501 U.S. 624, 111 S.Ct. 2491, 115 L.Ed.2d 555 (1991), which address the scope of a capital defendant's Due Process right to lesser-included-offense jury instructions. In *Beck*, the Supreme Court found that an Alabama statute violated Due Process under the facts of that case because it prohibited lesser-included-offense instructions in capital cases. The Court reasoned that "when the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense--but leaves some doubt with respect to an element that would justify conviction of a capital offense--the failure to give the jury the *1182 'third option' of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted [capital] conviction." 447 U.S. at 637, 100 S.Ct. at 2389. The Court's fundamental concern was that a jury convinced that the defendant had committed some violent crime, but not convinced that he was guilty of a capital crime, might nonetheless vote for a capital conviction if the only alternative was to set the defendant free with no punishment at all. *See also Spaziano v. Florida*, 468 U.S. 447, 455, 104 S.Ct. 3154, 3159, 82 L.Ed.2d 340 (1984) ("[t]he absence of a lesser included offense instruction increases the risk that the jury will convict ... simply to avoid setting the defendant free.... The goal of the *Beck* rule ... is to eliminate the distortion of the fact-finding process that is created when the jury is forced into an all-or-nothing choice between capital murder and innocence.")

In *Schad*, the Court clarified that it is not per se constitutional error for a defendant to be denied a lesser-included-offense instruction in a capital case. The Court found no constitutional violation in the denial to a capital defendant of an instruction on the lesser-included-offense of robbery where the trial court did give a separate lesser-included-offense instruction for second degree murder. The Court reached this conclusion despite the defendant's argument that his theory of defense (he robbed the victim but did not murder him) supported a robbery instruction, and that, in the absence of the instruction, the jury may have convicted him of capital murder simply because they thought him guilty only of robbery and robbery was not available as an alternative.

In the words of the Court:

> Petitioner makes much of the fact that the theory of his defense at trial was not that he murdered [the victim] without premeditation (which would have supported a second-degree murder conviction), but that, despite his possession of some of [the victim's] property, someone else had committed the murder (which would have supported a theft or robbery conviction, but not second-degree murder). Petitioner contends that if the jurors had accepted his theory, they would have thought him guilty of robbery and innocent of murder, but would have been unable to return a verdict that expressed that view. Because *Beck* was based on this Court's concern about "rules that diminish the reliability of the guilt determination" in capital cases, the argument runs, the jurors should have been given the opportunity "to return a verdict in conformity with their reasonable view of the evidence." ...

The argument is unavailing, because the fact that the jury's "third option" was second-degree murder rather than robbery does not diminish the reliability of the jury's capital murder verdict. To accept the contention advanced by petitioner and the dissent, we would have to assume that a jury unconvinced that petitioner was guilty of either capital or second-degree murder, but loath to acquit him completely (because it was convinced he was guilty of robbery), might choose capital murder rather than second-degree murder as its means of keeping him off the streets. Because we can see no basis to assume such irrationality, we are satisfied that the second-degree murder instruction in this case sufficedto ensure the verdict's reliability.

That is not to suggest that *Beck* would be satisfied by instructing the jury on just any lesser included offense, even one without any support in the evidence. In the present case, however, petitioner concedes that the evidence would have supported a second-degree murder conviction, and that is adequate to indicate *1183 that the verdict of capital murder represented no impermissible choice.

501 U.S. at 647-48, 111 S.Ct. at 2505 (citations omitted). *Schad*, therefore, rejects the proposition that Due Process always entitles a defendant to each lesser-included-offense instruction which may fit the facts of his case.

Here, the question is different, in that we focus not on whether there was a Due Process violation, but rather whether the failure of Johnson's trial attorneys to ask for a felony murder instruction amounted to *Strickland* performance error and prejudice. [FN15] Johnson's argument, drawing on *Beck*, is that the absence of a felony murder instruction made a capital murder conviction more likely because the other charges presented to the jury (robbery and intentional murder) did not allow for a conviction on an unintentional murder theory--a theory corresponding to the "third man" defense. Citing the 9-3 jury

vote for a life rather than death penalty recommendation, Johnson contends that the jury may have doubted the strength of the evidence of his intent to kill, but had no alternative "lesser" offense beyond robbery.

> FN15. There was no constitutional violation under *Schad* because the jury in Johnson's case did receive lesser-included instructions on robbery and intentional murder.

Having reviewed the record, we cannot say that Johnson was prejudiced by the absence of a felony murder instruction. Like the district court, we can find no logical basis to conclude that an additional alternative charge would have led a rational jury down a different path. The jury already was presented with non-capital alternatives (intentional murder and robbery) and still found Johnson guilty of capital murder. A felony murder instruction would not have changed the standard for a conviction on capital murder, and so for an objective and rational jury--and we must presume this was such a jury-- an instruction on that offense should not have changed the outcome. *See Kilgore v. Bowersox*, 124 F.3d 985, 995 (8th Cir.1997) (finding no prejudice where capital defendant charged his lawyer with ineffective assistance for not requesting a lesser-included charge on second degree murder). [FN16] Johnson's belief that the jury might have doubted the evidence of his intent to kill, but then nevertheless chosen to convict him for capital murder because it thought the only alternative was robbery and that offense would be too minor, is pure speculation, and highly strained speculation at that.

> FN16. We have found ineffective assistance where

trial counsel did not request a manslaughter instruction in a murder case where there was evidence suggesting the defendant killed the victim in the heat of passion and there was little evidence of premeditation. *See* Young v. Zant, 677 F.2d 792, 798-99 (11th Cir.1982). That is not the situation we have here.

Moreover, as discussed above, there is little evidentiary foundation for Johnson's belief that the jury in his case might have been inclined to convict for felony murder in lieu of the other offenses. The weight of the evidence pointed to only two men, not three, with Johnson as either (1) one of the two men and therefore guilty of capital murder, or (2) not one of them and therefore not guilty altogether. That issue was the focus of the evidence and of the parties' arguments before the jury. In this context, unintentional murder was not so viable an option for the jury that the absence of an instruction on felony murder amounts to *Strickland* prejudice.

D.

Johnson next claims that his trial lawyers were ineffective by misstating the law *1184 during their closing argument and also by failing to make a key objection during the prosecutor's closing argument. Johnson contends that these failures stemmed from his attorneys' failure to understand the intent requirement of Alabama's capital murder scheme. This argument, like many of Johnson's other objections, ultimately relates to the "third man" theory. We find no error entitling Johnson to relief.

Johnson contends that a statement by his counsel during closing argument improperly suggested to the jury that he could be convicted for capital murder if he were

merely present during the robbery. The challenged passage is as follows:

> You are going to have to go back there, and you are going to have to find, in order to convict and find Keith guilty, you are going to have to find that the State has proved an intentional killing occurred, a forcible robbery or intent to rob, and going to have to find that Keith was one of the men that was out there. That is what you are going to have to do in order to find each and every one of those beyond a reasonable doubt and to a moral certainty. Each one of you is going to have to do that.

In analyzing this claim, we must evaluate defense counsel's actions in context rather than focusing on a single isolated passage. Before beginning their closing arguments, trial counsel asked the court to give a three-paragraph instruction which emphasized the state's burden to prove beyond a reasonable doubt that Johnson was guilty of an *intentional killing* in order to convict him of capital murder. The court gave the instruction as requested. Moreover, references to finding Johnson guilty of capital murder if he were present at the scene need not be read as concessions that the capital charge could be proved on a felony murder theory. Rather, the closing argument fit the facts of the case and Johnson's primary defense--that he was not present at the Cantrell robbery and was not one of the two shooters.

In any event, even if we assumed performance error, any prejudice to Johnson was cured by the trial court's jury instructions. Prior to closing argument, the trial judge reminded the jury that the arguments of the lawyers were not to be taken as the law applicable to the case. Following closing argument, the judge again instructed the jury that it was the court's duty to decide and define the law. During his

instructions, the judge repeatedly and emphatically instructed the jury that a necessary element of the capital offense was that the defendant had committed an intentional killing, or had intentionally aided and abetted an intentional killing and repeatedly emphasized that the jury could not convict the defendant of capital murder unless it was convinced that these requirements had been proved beyond a reasonable doubt. Given these instructions, which Johnson does not contend are inaccurate, we find no prejudice from the isolated passage in his attorneys' closing argument that Johnson now highlights. *See United States v. Smith*, 918 F.2d 1551, 1562 (11th Cir.1990) (stating that "[b]ecause statements and arguments of counsel are not evidence, improper statements can be rectified by the district court's instruction to the jury that only the evidence in the case be considered"); *Shriner v. Wainwright*, 715 F.2d 1452, 1459 (11th Cir.1983) (noting that "with a properly instructed jury, there is nothing to show the jury relied on the prosecutor's remarks," and citing *Grizzell v. Wainwright*, 692 F.2d 722, 726-27 (11th Cir.1982) for proposition that " '[a] jury is presumed to follow [the] jury's instructions as to evidence it may consider' "); *see also United States v. Gainey*, 111 F.3d 834, 836-37 (11th Cir.1997) (prosecutors inappropriate comment *1185 not prejudicial where it "was mitigated by the district court's curative instructions"); *United States v. Barshov*, 733 F.2d 842, 846-47 (11th Cir.1984) (same).

For similar reasons, we reject on prejudice grounds Johnson's allegation that his trial attorneys were constitutionally ineffective because of their failure to object to certain comments made by the prosecutor in closing argument. In his argument, the prosecutor said the following:

> His honor will charge you in this case, ladies and gentlemen, concerning complicity. He will charge you in this case that if these two men went in there, and if they went in

> there to rob this dear lady and her husband, the act of one is the act of both, the act of one is the act of all, and what one does the other one is responsible for. You listen to his charge. When those two men busted through that door out there that night, everything that each one of them did the other one was responsible for under the law of the State of Alabama, and one is just as equally guilty for the death of this man as the other.

58 F.Supp.2d at 1350. According to Johnson, the prosecutor invited the jury to convict on evidence sufficient to support only a felony murder charge, a statement both wrong on the law and wrong on the facts.

The prosecutor's statement is surely wrong under Alabama's capital murder statute. Specific intent to kill is required for conviction. However, we find no prejudice from trial counsel's failure to object to this statement. First, the statement did not undercut Johnson's defense--that he was not present and was not one of the two robbers who shot Mr. Cantrell. Second, as discussed above, the trial evidence was generally inconsistent with a felony murder argument, so the likelihood that the jury would have considered the case differently in light of the prosecutor's comments is minimal. Third, and most importantly, any possible prejudice was cured by the trial court's correct jury instructions. Under our caselaw, as noted above, improper statements during argument can be cured by clear and accurate jury instructions like those given here. The trial judge plainly instructed the jury that the lawyers' arguments were not to be taken as descriptions of the law, and gave the jury proper instructions on the offenses for which Johnson was charged. We cannot say, on this record, that there was a reasonable probability that the outcome of the trial would have been different if

Johnson's counsel had objected to the prosecution's remarks. Accordingly, there is no *Strickland* prejudice.

E.

Johnson next alleges ineffectiveness in his trial attorneys' incomplete cross- examination of David Lindsey. First, Johnson claims that his counsel failed to identify for the jury certain asserted discrepancies between statements Lindsey had given to police--statements that trial counsel allegedly had in their possession--and testimony by Lindsey at the preliminary hearing and at trial. Second, Johnson asserts that his attorneys did not adequately impeach Lindsey when they failed to take full advantage of an alleged affair between Johnson and Lindsey's wife; by not further inquiring into a criminal investigator's report which said that Lindsey was considered by some to be a "thief"; and by not inquiring into evidence that he was not well thought of when he left his employment as an oil rigger. Finally, Johnson argues that counsel inappropriately failed to call as witnesses several people who had shared the motel room with him in order to rebut Lindsey's testimony regarding Johnson's alleged admissions.

*1186 The Alabama Court of Criminal Appeals considered and rejected these objections in the state post-conviction proceeding. As that court explained:

> Defense counsel demanded a preliminary hearing for discovery purposes to cross-examine prosecution witnesses before trial. One of those witnesses was David Lindsey. Defense counsel reviewed that preliminary hearing transcript, including Lindsey's testimony, in detail before trial. They also interviewed the officer in charge of the investigation several times, and they

> talked a great deal with Johnson about the facts of the case. Their conduct of the defense was based upon what Johnson told them, and Johnson told them "the whole story." In addition to all those efforts, defense counsel employed an investigator to help them find any useful impeachment information about Lindsey. That investigator worked on the case for more than nine weeks. Defense counsel effectively cross-examined David Lindsey. Defense counsel brought out a contradiction between Lindsey's trial testimony and the testimony that he had given at the preliminary hearing. Defense counsel suggested that Lindsey was biased against Johnson because Johnson and Lindsey's wife had had an affair. Trial counsel forced Lindsey to admit that he had been convicted of illegal possession of con-trolled substances, specifically methamphetamines, and that Lindsey shot the drug into his arms. As defense counsel argued to the jury, "Mr. Lindsey was a man who mainlined speed, shot it up his arm."

612 So.2d at 1300.

Especially in light of these findings, we find no performance error. Johnson's attorneys adequately prepared for Lindsey's testimony, even hiring an investigator, and challenged Lindsey's character, motives, and credibility on cross. Absent a showing that real impeachment evidence was available and could have been, but was not, pursued at trial, Johnson cannot establish that the cross conducted by his attorneys fell outside the range of professionally competent assistance. Claims that an attorney should have cross-examined further on inconsequential matters do not establish

constitutionally deficient performance. *See Mills v. Singletary*, 63 F.3d 999, 1021 n. 36 (11th Cir.1995). Many of the inconsistencies highlighted by Johnson are, on this record, inconsequential. As the district court put it, trial counsel's "actual cross cast a general shadow over Lindsey's character and veracity by bringing out his drug use and hinting at a motive for lying in the form of an affair between the petitioner and Johnson's wife. The court cannot imagine that a jury unpersuaded by this information would have rejected Lindsey's testimony based on inconsistencies in some rather minor details." 58 F.Supp.2d at 1356.

Moreover, when an attorney "substantially impeache[s]" the witness, no claim for ineffectiveness can succeed unless the petitioner comes forward with "specific information" which "would have added to the impeachment of the State's witnesses." *Aldrich v. Wainwright*, 777 F.2d 630, 636-37 (11th Cir.1985); *see also Card v. Dugger*, 911 F.2d 1494, 1506 (11th Cir.1990). Without that kind of information, a petitioner cannot meet his burden of proving a *Strickland* violation. Johnson's arguments fail on this basis as well.

In particular, Johnson's argument that the other persons at the motel would have discredited Lindsey's testimony regarding Johnson's admissions is unsubstantiated by the record. Johnson has offered no evidence that any of the individuals who were present with him in the Oxford motel would have testified in a way that was inconsistent with the testimony given by Lindsey. Johnson points only to unsworn *1187 statements taken from the men which did not expressly confirm Lindsey's testimony about Johnson's admissions. But none of these statements indicates that Johnson did not admit to the crime, and none directly contradicts Lindsey's testimony. *See Card*, 911 F.2d at 1506 (finding no ineffectiveness where "none of the evidence that petitioner claims could have been introduced directly contradicts or undermines the testimony of" the State's

witness). Johnson offers only speculation that the missing witnesses would have been helpful. This kind of speculation is "insufficient to carry the burden of a habeas corpus petitioner." *Aldrich*, 777 F.2d at 636.

For all of the foregoing reasons, Johnson cannot establish a *Strickland* violation based on the conduct of his trial counsel. [FN17]

FN17. Johnson is plainly not entitled to relief under *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984) (holding that *Strickland* prejudice will be presumed if: (1) counsel is completely denied; (2) counsel is denied at a critical stage of trial; or (3) counsel "entirely" fails to subject the prosecution's case to meaningful adversarial testing). As best we can tell, Johnson makes two separate arguments based on *Cronic*. First, he contends that his attorneys' errors, viewed in the aggregate, constitute prejudicial ineffective assistance of counsel even if none of those errors, standing alone, constitutes a *Strickland* violation. We disagree; to the extent Johnson's attorneys committed performance errors, those errors in the aggregate do not warrant setting aside his conviction. Second, Johnson asserts that his trial attorneys' failure to challenge the State's evidence on the intent issue represents a "fail[ure] to subject the prosecution's case to meaningful adversarial testing" within the meaning of *Cronic*, 466 U.S. at 659, 104 S.Ct. at 2047. But Johnson cites no case providing relief under *Cronic* based on such a narrow attack on his counsel's decision-making. *Cronic* applies when counsel "entirely" fails to challenge the prosecution, and that is indisputably not so here. Nor do the cases cited by Johnson have any applicability to the facts of

this proceeding. *Compare* Young v. Zant, 677 F.2d 792, 798 (11th Cir.1982) (pre-*Cronic* decision finding ineffective assistance where attorney conceded client's guilt). Finally, as discussed above, we find no performance error in the choices made by Johnson's trial counsel, so the question of whether we must "presume" prejudice never even arises.

V.

Johnson's assertion that his appellate counsel, Mays, was constitutionally ineffective requires little separate discussion. Johnson contends that appellate counsel made two main errors. First, according to Johnson, counsel performed inadequately by presenting only a few grounds for reversal when other, more substantial objections were available. Second, Johnson contends that counsel's brief to the Supreme Court of Alabama was merely a copy of his brief to the Court of Criminal Appeals, without any attempt to respond to the reasoning of the lower court or advance the arguments that (Johnson now feels) should have been advanced. Johnson insists that, by simply submitting to the Alabama Supreme Court his prior brief, counsel tacitly assented to the Court of Criminal Appeals's unpersuasive analysis, and provided no assistance whatsoever in Johnson's effort to obtain direct review from the state supreme court.

The standards applicable to Johnson's claims of ineffectiveness against trial counsel apply equally to the charges leveled against his appellate lawyer. *See* Heath v. Jones, 941 F.2d 1126, 1130 (11th Cir.1991); Orazio v. Dugger, 876 F.2d 1508, 1513 (11th Cir.1989). To prevail, Johnson must demonstrate both that his appellate counsel's performance fell below reasonable professional standards and that he was prejudiced by his attorney's substandard

performance. *See* *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064.

*1188 Johnson cannot meet this demanding test. Appellate counsel's choices regarding which issues to press on appeal were adequate in the circumstances. Johnson argues that the two guilt-related arguments raised as errors by his appellate counsel--that a particular juror should not have been struck for cause and that a motion for judgment of acquittal should have been granted because the trial evidence was insufficient to support his conviction--were two of the less serious errors that could have been raised. Johnson further claims that, rather than the faulty and weak arguments actually raised, appellate counsel should have asserted many of the more substantial claims presented in this petition.

It is difficult to win a *Strickland* claim on the grounds that appellate counsel pressed the wrong legal arguments where the arguments actually pursued were reasonable in the circumstances. We have emphasized that even in a death penalty case, counsel must be "highly selective about the issues to be argued on appeal...." *United States v. Battle*, 163 F.3d 1, 1 (11th Cir.1998). The district court, having considered the record and Mays's testimony during the state post-conviction proceeding, found that Mays had carefully considered many of the claims now raised in appeal, but ultimately chose to pursue the claims he felt were most likely to prevail and winnow out the arguments he thought were less persuasive. We agree. In any event, there was little persuasive foundation, and little likelihood of success, for many of the arguments Johnson now suggests should have been pressed on appeal.

Likewise, we reject Johnson's claim that appellate counsel was ineffective by failing to address specifically in his petition for a Writ of Certiorari to the Supreme Court of Alabama the findings and conclusions reached by the Court of Criminal Appeals. Counsel's brief was sufficient to alert

the Alabama Supreme Court to the issues reasonably raised before the Court of Criminal Appeals. Moreover there has been no showing regarding the effect, if any, that a different brief would have had on the outcome of proceedings. Johnson, in short, does not establish a *Strickland* violation on the part of his appellate counsel.

VI.

Johnson next asserts that the State violated the rule set forth in *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), when it failed to produce "all information favorable to the defense" as requested in Johnson's pre-trial discovery motion. The items Johnson points to as *Brady* material are: (1) a report prepared by the Alabama Bureau of Investigation ("ABI"), which suggested that the police had identified suspects other than Johnson and contained statements taken from the men present in the motel room at the time of Johnson's arrest; [FN18] and (2) documentary evidence that the State was investigating two other suspects in connection with the murder of Mr. Cantrell. [FN19] Johnson claims that the suppressed *1189 information could have been used to impeach the testimony of two of the state's witnesses, Lindsey and Sergeant Newell.

FN18. In the report, the chief investigator, Sergeant Newell, noted that an (unnamed) informant had told authorities that Garland and Wayne McCulloch "did the shooting."

FN19. This evidence includes: (1) an undated set of notes which indicated that a woman named Louise Blevin told someone that Garland McCulloch would do anything for money, had guns, and was a

> companion to Johnson and others; (2) a sheet of paper with "Garland # 1" scribbled on it; and (3) a page of notebook paper with the names Ray McCulloch, Garland McCulloch, Wayne McCulloch, and Jerry, along with the words "beverages," "Hartselle," and "79 Olds."

The *Brady* legal framework is well- settled. "There are three essential components of a true *Brady* violation: the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281, 119 S.Ct. 1936, 1948, 144 L.Ed.2d 286 (1999). Thus, to prove a *Brady* claim, a party must show: "(1) suppression by the prosecution (2) of exculpatory evidence (3) material to the issues at trial or sentencing." *Kennedy v. Herring*, 54 F.3d 678, 682 (11th Cir.1995). Included in the materiality prong of *Brady* analysis is a requirement that the petitioner make a showing of actual prejudice. *See id.* To demonstrate prejudice, the petitioner must "convince us that there is a reasonable probability that the result of the trial would have been different if the [allegedly suppressed items] had been disclosed to the defense. In other words, the question is whether the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *High v. Head*, 209 F.3d 1257, 1267 (11th Cir.2000) (citations and internal quotation marks omitted); *see also Strickler*, 527 U.S. at 289-90, 119 S.Ct. at 1952 ("'the question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence'") (citation omitted). [FN20]

FN20. Materiality is to be determined collectively, not item-by- item. *See United States v. Scheer*, 168 F.3d 445, 452 (11th Cir.1999).

Johnson does not contend that the items in question are exculpatory in the sense that they would have been used in the defense's case- in-chief. Nor does he contend that, if he had access to these items, he would have used them as leads to conduct an investigation into the identity of the "real" shooters or even the identity of the unnamed source referenced in the ABI report. Instead, Johnson contends only that they could have been used for impeachment during cross examination. The duty to disclose can include impeachment evidence. *See United States v. Bagley*, 473 U.S. 667, 676, 105 S.Ct. 3375, 3380, 87 L.Ed.2d 481 (1985). The problem for Johnson, however, is that he fails to show that the State's failure to produce these materials caused him prejudice.

Johnson contends that he could have used the ABI report to impeach Sergeant Newell. According to Johnson, information contained in the report not only suggests the involvement of other suspects, particularly Garland and Wayne McCulloch, but also contains an allegation (attributed to the unnamed source) that the McCulloch brothers "did the shooting." Johnson argues that this evidence tends to establish that the two McCullochs were the shooters, and that he, at best, was the "third man." But Johnson makes no effort to explain, let alone demonstrate from the record, how he permissibly could have used this information from the ABI report for the narrow purpose of discrediting specific direct testimony by Sergeant Newell during a cross-examination of that witness. Nor does Johnson explain how his asserted inability to "impeach" Sergeant Newell with this allegation from an unnamed source was so devastating to the

defense as to undermine confidence in the verdict. *1190 To reiterate, Johnson does not argue that the report as a whole or the underlying suggestion from the unnamed source that the McCullochs "did the shooting" would have been admissible as substantive evidence for the defense. [FN21] Even assuming that the report, and in particular the unnamed source's reference to the McCullochs as doing the shooting, could properly have been invoked at all during the cross-examination of Sergeant Newell, its use at that point and thereafter during the trial would have been extremely limited, and its potential persuasive value would have been correspondingly limited.

FN21. At oral argument, Johnson's present counsel conceded that the actual report would not be admissible.

Of course, to the extent the ABI report or the investigative notes merely suggested that there may have been participants other than Johnson in the attempted robbery of the Cantrells, that information does not establish that Johnson was not involved, or indeed that he was not the "second man." More to the point, we are unconvinced that evidence of that sort--identifying additional participants in the crime, but not directly disputing Johnson's presence or status as the "second man"--could have been used to discredit in any meaningful way Sergeant Newell's testimony. Significantly, there was already evidence before the jury regarding the alleged involvement of other participants.

As for the statements of the men present in the motel room with Johnson, a similar analysis applies. Johnson asserts that these statements would have been useful to impeach Lindsey, because they are inconsistent with Lindsey's testimony. But none of these witness statements

directly contradicted Lindsey's testimony about Johnson's admissions. These witness statements do not corroborate Lindsay's story, and in that sense might have be used to challenge Lindsey's testimony. But the statements do not actually dispute Lindsey's testimony regarding Johnson's admissions, and as noted above Lindsey's credibility was already amply called into question during cross- examination. Johnson fails to show that the unavailability of the statements for the limited purpose of using them in cross examination was so serious as to undermine confidence in the verdict. Accordingly, having reviewed the record, we find that the allegedly suppressed items--viewed individually or collectively--were not material, and hence there was no *Brady* violation entitling Johnson to relief. *See* Moore, 240 F.3d at 915-16 (no *Brady* violation entitling petitioner to habeas relief where petitioner failed to show prejudice from the allegedly suppressed items).

VII.

Johnson's final claim on appeal is that the jury instructions violated the Supreme Court's holding in *Cage v. Louisiana*, 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990) (per curiam), *overruled in part*, *Estelle v. McGuire*, 502 U.S. 62, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991), because it lowered the government's burden below proof beyond a reasonable doubt. We find no error entitling Johnson to relief. [FN22]

FN22. There is no dispute that Johnson's attorneys failed to object to the trial court's reasonable doubt instruction and failed to raise the issue on direct appeal. To excuse this default, Johnson again claims ineffective assistance of counsel. We need not resolve that claim, however, because we find the

instruction constitutionally acceptable.

In a criminal case, the government must prove each element of a charged offense beyond a reasonable doubt. *See, e.g., In re Winship*, 397 U.S. 358, 361, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368 (1970). Although a court must instruct *1191 the jury that a defendant's guilt has to be proven beyond a reasonable doubt, the Supreme Court has stated that "the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course." *Victor v. Nebraska*, 511 U.S. 1, 5, 114 S.Ct. 1239, 1243, 127 L.Ed.2d 583 (1994). If a trial court does attempt to define reasonable doubt, it must explain the standard correctly, although "the Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof." *Id.*

When reviewing the correctness of reasonable-doubt charges, the Supreme Court has phrased the proper constitutional inquiry as " 'whether there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the *Winship* standard.' " *Harvell v. Nagle*, 58 F.3d 1541, 1542-43 (11th Cir.1995) (quoting *Victor*, 511 U.S. at 6, 114 S.Ct. at 1243). We consider the instruction as a whole to determine if the instruction misleads the jury as to the government's burden of proof. *See id.; see also Victor*, 511 U.S. at 5-6, 114 S.Ct. at 1243 (instructions must be "taken as a whole"); *Cage*, 498 U.S. at 41, 111 S.Ct. at 329 (explaining that "[i]n construing the instruction, we consider how reasonable jurors could have understood the charge as a whole").

At the close of the evidence at Johnson's trial, the judge gave the jury a lengthy instruction on reasonable doubt. Johnson contends that the instruction was flawed because, in the course of the instruction, the trial judge (1) equated "beyond reasonable doubt" with "moral certainty"; (2)

referred to a reasonable doubt as an "actual and substantial one," or a "a doubt for which a good reason can be given or assigned"; and (3) said that in "the final analysis" each juror would have to look into his "own heart and mind" for the answer. Johnson asserts that these comments effectively lowered the burden of proof below the reasonable doubt standard.

In *Cage*, the petitioner had been convicted of first degree murder and sentenced to death. During the trial, the court instructed the jury as follows:

> If you entertain a reasonable doubt as to any fact or element necessary to constitute the defendant's guilt, it is your duty to give him the benefit of that doubt and return a verdict of not guilty. Even where the evidence demonstrates a probability of guilt, if it does not establish such guilt beyond a reasonable doubt, you must acquit the accused. This doubt, however, must be a reasonable one; that is one that is founded upon a real tangible substantial basis and not upon mere caprice and conjecture. It must be such doubt as would give rise to a grave uncertainty, raised in your mind by reasons of the unsatisfactory character of the evidence or lack thereof. A reasonable doubt is not a mere possible doubt. It is an actual substantial doubt. It is a doubt that a reasonable man can seriously entertain. What is required is not an absolute or mathematical certainty, but a moral certainty.

498 U.S. at 40, 111 S.Ct. at 329 (emphasis in original omitted)

The Court held that this instruction ran afoul of *Winship*. According to the Court, even though the charge did

at one point instruct the jury that to convict the defendant, guilt must be found beyond a reasonable doubt, it improperly went on to equate a reasonable doubt with a " 'grave uncertainty' " and an " 'actual substantial doubt.' " "It is plain to us," said the Court, "that the words 'substantial' and 'grave,' as they are commonly *1192 understood, suggest a higher degree of doubt than is required for acquittal under the reasonable-doubt standard. When those statements are then considered with the reference to 'moral certainty,' rather than evidentiary certainty, it becomes clear that a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause." *Id.* at 41, 111 S.Ct. at 329-30.

Cage is limited precedent because it has been modified by subsequent decisions. In *Cage*, as noted above, the Court had merely asked whether a reasonable jury, viewing the challenged instruction as a whole, "could" have construed it in a way that would violate *Winship*. In *Estelle*, however, the Court explained that the appropriate standard is whether there exists a "reasonable likelihood" that the jury read the instruction to lower the required threshold. 502 U.S. at 72, 112 S.Ct. at 482; *see also Victor*, 511 U.S. at 5-6, 114 S.Ct. at 1243 ("The constitutional question ... is whether there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the *Winship* standard.").

In *Victor*, the Court used that new test to find that a trial court's use of the term "moral certainty" did not result in a constitutional violation on the record before it. The Court reasoned that "[w]e do not think it reasonably likely that the jury understood the words 'moral certainty' either as suggesting a standard of proof lower than due process requires or as allowing conviction on factors other than the government's proof." *Id.* at 16, 114 S.Ct. at 1248. In a companion case, *Sandoval v. California*, 511 U.S. 1, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994), the Court rejected the

argument that equating a reasonable doubt with an "actual and substantial" doubt lowered the degree of doubt permissible for a conviction. Although the *Sandoval* Court found the disputed language "somewhat problematic," it concluded that "the context makes clear that 'substantial' is used in the sense of existence rather than magnitude of the doubt." *Id.* at 19-20, 114 S.Ct. at 1250.

Here, the trial judge employed "beyond a reasonable doubt" and "to a moral certainty" interchangeably and even informed the jury that the two terms were synonymous. But other portions of the instruction ensured that the "moral certainty" language would not reasonably be understood to lower the State's burden. We have specifically recognized that the use of the term "moral certainty" in a reasonable doubt instruction is not fatal. *See Felker v. Turpin*, 83 F.3d 1303, 1309 (11th Cir.1996) (trial court's definition of reasonable doubt as " 'doubt which is based on the evidence, a lack of evidence or a conflict in the evidence' " and " 'doubt which is reasonably entertained as opposed to vague or fanciful or farfetched doubt,' served to erase any taint created by the term 'moral certainty' and to thus place it beyond the potential for constitutional harm"); *Harvell*, 58 F.3d at 1543 (trial court's statements that reasonable doubt had to be derived from the evidence and that reasonable doubt could not be "fanciful, vague, whimsical, capricious, conjectural or speculative" cured any potential constitutional harm associated with the term "moral certainty").

The instruction in this case included substantial language echoing the key phrases in *Felker* and *Harvell*. Specifically, the trial judge in this case repeatedly informed the jury that it could not convict Johnson unless the evidence presented to it was inconsistent with any reasonable theory of innocence; the judge also repeatedly instructed the jury not to go beyond the evidence and engage in speculation *1193 in order to find Johnson guilty. [FN23] The instruction as a

whole, which emphasized the jury's obligation to focus on the evidence presented in court and made abundantly clear that a conviction could not be based on speculation, convinces us that it was not reasonably likely that the jury understood the instructions to allow conviction based on proof insufficient to satisfy *Winship*.

> FN23. For example, the trial court advised the jury that "it [is] the duty of the State to show ... to the exclusion of every other reasonable hypothesis every circumstance necessary to show that the Defendant is guilty." The court added that "if, after hearing all the evidence, your mind is left in such a state that you must resort to speculation or guesswork as to the Defendant's guilt or innocence, then the State has not proved to you beyond a reasonable doubt that the Defendant is guilty, and you must acquit." And the court emphasized that "a reasonable doubt is not a fanciful doubt. It is not a vague or speculative or uncertain doubt...." Similar language appears throughout the court's detailed instruction.

The trial judge's references to "actual and substantial" doubt do not change that conclusion. As we said in *Harvell*:

> Although the use of the term "actual and substantial doubt" is somewhat problematic and perhaps even ill-advised, the Supreme Court made clear, subsequent to *Cage*, that the use of such a term in the proper context, bolstered by adequate explanatory language, can survive constitutional scrutiny. *See Victor* .... The instruction challenged in *Victor* provided in part:

> A reasonable doubt is an actual and substantial doubt arising from the evidence, from the facts or circumstances shown by the evidence, or from the lack of evidence on the part of the state, as distinguished from a doubt arising from mere possibility, from bare imagination, or from fanciful conjecture.
>
> The Supreme Court held that the actual and substantial doubt language did not violate Victor's due process rights because the rest of the sentence made clear that substantial was being used in "the sense of existence rather than magnitude of the doubt." In other words, in context, substantial meant actual or real rather than abundant or plentiful.
>
> The surrounding language in the trial court's instruction in Harvell's case likewise established that substantial meant real and not imaginary. The trial court accomplished this in two ways. First, as in *Victor*, the instruction provided that substantial doubt arises from the evidence itself, stating that reasonable doubt had to be derived from the evidence, lack of evidence, or any part of the evidence. Second, Harvell's instruction stated that reasonable doubt cannot be fanciful, vague, whimsical, capricious, conjectural or speculative.

Id. at 1543 (footnote omitted).

As in *Harvell*, the surrounding language in the charge given the jury in the present case, contrasting an "actual and substantial" doubt with other kinds of doubt, makes clear that the phrase was not intended to require more than a reasonable doubt. Specifically, the "actual and substantial" language

was used to explain that a "reasonable doubt" was not an imaginative or speculative doubt. In addition, the trial judge further defined the requisite doubt as "a doubt the evidence generates when the jury carefully weighing all the evidence cannot say that they feel an abiding conviction of the defendants' guilt." The trial judge's use of the phrase "actual and substantial" doubt did not make it reasonably likely (alone or in conjunction with the other language highlighted by Johnson) that Johnson would be convicted under a standard of proof below that required by Due Process. [FN24]

FN24. The other language in this instruction to which Johnson objects does not give rise to a constitutional violation in these circumstances.

*1194 Viewed as a whole, the trial court's instruction was constitutionally acceptable. Johnson's objections, viewed individually and collectively, do not prove a *Cage* violation entitling him to habeas relief; this claim, like his other claims, is simply not established on this record. Accordingly, we affirm the district court's denial of Johnson's § 2254 petition.

AFFIRMED.

APPENDIX B

Opinion

United States District Court
for the Northern District of Alabama

July 23, 1999

UNITED STATES DISTRICT COURT,

N.D. ALABAMA,

SOUTHERN DIVISION.

ANTHONY KEITH JOHNSON,

Petitioner,

v.

JOHN E. NAGLE, WARDEN AND THE ATTORNEY GENERAL OF THE STATE OF ALABAMA

Respondents.

No. CV-93-N-1121-S.

JULY 23, 1999

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*1314 Memorandum of Opinion

EDWIN L. NELSON, District Judge.

The court has for consideration the petition for writ of habeas corpus brought pursuant to 28 U.S.C. § 2254 on behalf of Anthony Keith Johnson, an Alabama state prisoner, convicted of capital murder and sentenced to death. On this petition Johnson is represented by counsel from the firm of Covington & Burling. Counsel for the State of Alabama have filed a Habeas Corpus Checklist, a voluminous record of the proceedings from the Alabama trial and appellate courts, a revised Habeas Corpus Checklist, and an answer to the petition.

The court has conducted a hearing on the narrow issue of what information the petitioner conveyed to his trial counsel upon which they relied in formulating their trial strategy. Among other things, the petitioner has alleged that his trial attorneys rendered him ineffective assistance by choosing a flawed defense strategy based upon a mistaken understanding of the law and that the trial judge gave a constitutionally flawed jury instruction defining reasonable doubt. The court will address these and other matters infra.

I. Procedural History.

A. Trial and Direct Appeal.

1. Trial Evidence.

On direct appeal, the Alabama Court of Criminal Appeals set forth the facts established at trial as follows:

> The record reveals that on the evening of March 11, 1984, the victim, Kenneth Cantrell, and his wife, Nell Cantrell, were at their home in Hartselle, Alabama. The Cantrells had been in the jewelry business for 24 years and at this time were conducting the business from their home.

Mrs. Cantrell received a phone call from a person identifying himself as Bill Spears from Florence, Alabama, and he asked to speak to Mr. Cantrell. He told Mr. Cantrell that he would like to purchase some jewelry from him, and they arranged a meeting a short time thereafter at the Cantrell home. Mr. Cantrell was apparently suspicious of the caller, because he asked his wife to hide his wallet and bring him his .38 caliber pistol.

When Mrs. Cantrell heard a knock at the door, which led from their carport into the combined living room and dining room area of their home, she went to answer it. She observed that the man already had the storm door open, but she had to open the door to hear what he had to say. When she opened the door she encountered a man between 45 and 50 years of age who identified himself as Bill Spears. She noticed that he held one hand behind his back and she asked if he was concealing something. He said that he was not and showed her his hand.

At the same time he motioned for another man who had been hiding in the carport to come forward. At this, the man already at the door grabbed Mrs. Cantrell, and the other man, wearing a blue bandana over his face and brandishing a "real shiney" gun in his hand, announced "This is a holdup."

Johnson v. State, 521 So.2d 1006, 1007-08 (Ala.Crim.App.1986).

At that point, according to the testimony at trial, Mrs. Cantrell broke free from the man holding her, eluded a second attempt by the first man to grab her, and fell at her husband's feet between the couch and coffee table. The first man crossed the room and positioned himself behind a couch he had overturned. The second man then entered the house and began shooting. During or just before the gunfight, Mr. Cantrell said, "Freeze ... I have got you covered," to which one of the men replied "No, we have got you, Cantrell." [FN1] While on the floor, Mrs. Cantrell was able *1315 to observe that one of the men wore a pair of brown boots. She also testified that only two guns were fired during the exchange, and that the shots fired at her husband appeared to come from the direction of the second intruder. After several shots had been fired, there was a pause in the gunfire. One of the men said, "Come on in, Bubba ... we have got him." As the two men in the room made their way to the door, but before they reached it, Mr. Cantrell fired one final shot and someone said. "Oh." Mrs. Cantrell then heard the sound of shuffling feet, as if one of the intruders was being assisted out of the house. Tr. at 364-388.

FN1. The testimony of Mrs. Cantrell with regard to the exact words spoken and the timing of the utterances is somewhat inconsistent. See supra note 19.

Mrs. Cantrell waited a moment after the intruders left, looked up at her husband, noticed that he had blood all over him and that she had blood all over her but that she was not shot. She then called an ambulance and police to the scene.

Mr. Cantrell sustained six gunshot wounds in the exchange, three in the right side of his chest, one in the left side of his chest, one on the back of his right arm, and one to his right middle finger. The bullets which struck him in the

chest passed through his lungs and the large arteries from the heart, causing rapid death.

On the evening of March 12, 1984, the day after the murder, appellant went to the home of David Lindsey, who was a friend, in Newell, Alabama. Appellant told Lindsey that he had been shot. When Lindsey inquired as to what had happened, appellant stated, "Well you know how it is when you have got the habit." Appellant told Lindsey that he knew he had been to Vietnam and asked if he knew a medic or someone who could get the bullet out. Lindsey told him that he knew no one who could do that.

At appellant's request, Lindsey, on the morning of March 13, 1984, drove him to a motel in Oxford to meet Gene Loyd. Lindsey testified that Loyd and appellant were glad to see each other, and Loyd asked appellant where he had been. Appellant replied that he "had to get the hell out of Hartselle." He said that he and some friends had gone into a place to get some gold and that he had been shot. [FN2] According to Lindsey, appellant stated, "I got shot, but I got off a couple of rounds, and I believe I got that son of a bitch." Lindsey returned home, where he heard that a murder had occurred in Hartselle, and he contacted authorities.

FN2. Lindsey's actual testimony was that the defendant said, "Me and some friends, we got--went into a place to get some gold, and I believe my buddy got shot." Tr. at 423.

Appellant was arrested on March 14, 1984, at the motel where he had been taken by Lindsey. A pair of brown boots, which appellant claimed to own, were found at the scene of the arrest. A bullet wound was discovered in his back; that wound was 50.5 inches from the ground when

appellant was standing. A search warrant was obtained, and the bullet was removed from his back.

It was discovered that Mr. Cantrell had fired his R.G. brand revolver six times at the intruders. Most of the shots were in an upward direction from the point where he was sitting on his couch. The revolver was loaded with .38 special C.C.I. Blazer cartridges manufactured by Omark Industries. Four C.C.I. Blazer bullets were recovered from objects which they had struck at the scene. One bullet apparently passed through the ceiling and could not be found. One bullet passed through a pane of glass on the back door 46.375 inches from the ground. A search of cardboard boxes and the wall in this bullet's path failed to reveal the bullet. The four C.C.I. Blazer bullets found at the scene had the same number of lands and grooves as the bullets test fired from Mr. Cantrell's R.G. revolver, but it was impossible to definitely make a determination that Mr. Cantrell's revolver actually fired the bullets.

*1316 The bullet which was removed from appellant's back was a .38 special C.C.I. Blazer. The bullet had the same number of lands and grooves as those test fired from Mr. Cantrell's R.G. revolver and those found at the scene, but again, it was impossible to make a definite determination that Mr. Cantrell's revolver actually fired the bullet.

The bullet which was removed from appellant's back had glass imbedded in its nose. Test comparisons of the glass removed from the bullet and that found in the pane on the back door, through which the unaccounted-for bullet had passed, revealed that all of their physical properties matched, with no measurable discrepancies. Based upon F.B.I. statistical information, it was determined that only 3.8 out of 100 samples could have the same physical properties, based upon the refractive index test alone, which was performed.

Johnson v. State, 521 So.2d 1006, 1008-09 (Ala.Crim.App.1986).

2. Proceedings on Direct Appeal.

After the petitioner was arrested as a murder suspect, Attorneys Joseph W. Propst and Thomas M. DiGiulian of Decatur, Alabama, were appointed to represent him. The court conducted a hearing on March 15, 1984, at which time the petitioner advised the court that he needed medical attention for a wound in the back, and the District Attorney informed him that the State would attempt to procure any physical evidence from medical treatment or surgical removal of a foreign object from his body for use in its capital murder investigation. After consulting with his court-appointed attorneys, the petitioner refused any medical treatment at that time. Because his medical condition continued to worsen, the petitioner was taken to the Emergency Room at Decatur General Hospital the next day for treatment. An x-ray revealed the presence of an object similar to a bullet in his back, but Johnson refused to allow physicians to remove it.

On March 26, 1984, the petitioner was formally charged with capital murder. At the preliminary hearing, conducted on April 19, 1984, the court found probable cause to believe that Johnson had committed the capital murder of Kenneth Cantrell and bound him over to the grand jury.

Thereafter, the District Attorney filed an application for a search warrant by which he sought court authorization to have the object surgically removed from Johnson's back. Following a full hearing on May 18, 1984, the Morgan County Circuit Court granted the application and, on May 22, 1984, Johnson's attorneys petitioned the Alabama Court of Criminal Appeals to stay the surgery and for a writ of prohibition, asserting that the proposed involuntary surgery

would unconstitutionally invade his right to privacy, violate his right against self- incrimination, and violate his Fourth Amendment right against unreasonable searches and seizures. On May 24, 1984, the Alabama Court of Criminal Appeals denied both requests. His application for rehearing was also denied and, on May 28, 1984, Johnson was transported to Decatur General Hospital in Decatur, Alabama, where a bullet was surgically removed from his back.

In June 1984, the grand jury in Morgan County charged the petitioner by indictment with the intentional murder of Kenneth Cantrell during the course of a robbery, in violation of Ala.Code § 13A-5-40 (1975). A year later, on June 20,1985, the petitioner was found guilty by a jury of capital murder as charged in the indictment, and on June 21, 1985, the jury voted nine to three to recommend that Johnson be sentenced to life imprisonment without the possibility of parole. At the close of the separate sentencing hearing required by Ala.Code § 13A-5-47 (1975), on November 8, 1985, Morgan County Circuit Court Judge A.L. Hundley rejected the recommendation of the jury and sentenced Johnson to death.

Judge Hundley entered findings of fact with respect to both the petitioner's guilt and sentence of death. Regarding the aggravating circumstances defined at *1317Ala.Code § 13A-5-49, the trial court found that two were applicable:

1. The capital offense was committed by a person under sentence of imprisonment [§ 13A-5-49(1)].

2. The capital offense was committed while the defendant was engaged in the commission of a robbery [§ 13A-5-49(4)].

Moreover, the court found "that there are some statements in the pre-sentence report and some other aspects

of the case that have certain mitigating aspects to them [and] [t]hese were considered ... including the jury's recommendation." The trial court found no other mitigating circumstances, either those defined by statute or otherwise, stating:

> The Court finds the aggravating circumstances are substantial and controlling. The mitigating circumstances (other than the jury's recommendation) can be found only by a strained search and are deemed insubstantial by the Court in the face of the evidence which demonstrates a vicious killing of a man in what should have been the quiet repose and safety of his own home....

B. Post-Trial Proceedings in State Court.

On appeal to the Alabama Court of Criminal Appeals, where he was represented by newly appointed appellate counsel, John Mays, the petitioner raised four claims:

1. The trial court erred in permitting the State to challenge juror Carrell for cause (against capital punishment) over the petitioner's objection.

2. The trial court erred when it refused to instruct the jury that it could not consider the theft by use of force allegation in the capital murder indictment as an aggravating circumstance in the penalty phase of the trial.

3. The trial court erred in refusing the petitioner's motions for judgment of acquittal on the grounds that there was no proof that he was in Morgan County when the murder was committed and there was no proof that the gun he possessed at the time he was arrested was used in the shooting.

4. The trial court erred when it refused to strike information from the pre- sentence report indicating that marijuana was found at the scene when the petitioner was arrested.

The Alabama Court of Criminal Appeals affirmed the conviction and sentence on November 25, 1986, in a written opinion; an application for rehearing was denied on January 27, 1987. [FN3] The Alabama Supreme Court affirmed both the conviction and the sentence on February 5, 1988, and the United States Supreme Court denied Johnson's petition for the writ of certiorari on October 3, 1988. *Johnson v. State*, 521 So.2d 1006 (Ala.Crim.App.1986), aff'd, 521 So.2d 1018 (Ala.1988), *cert. denied*, 488 U.S. 876, 109 S.Ct. 193, 102 L.Ed.2d 162 (1988).

FN3. In its opinion, the Court of Criminal Appeals, under its Rule 45A power to review plain errors and defects in trial proceedings, also addressed the matter of whether the removal of the bullet from the defendant's body against his wishes violated the Fourth Amendment's limitation on surgical probing for evidence outlined in *Winston v. Lee*, 470 U.S. 753, 105 S.Ct. 1611 (1985). *Johnson v. State*, 521 So.2d 1006, 1014-15 (Ala.Cr.App.1986), aff'd, 521 So.2d 1018 (Ala.1988), *cert. denied*, 488 U.S. 876, 109 S.Ct. 193, 102 L.Ed.2d 162 (1988).

After the direct review process was completed, Johnson's present counsel then undertook to represent him in post-conviction proceedings and have continued to do so until the present. [FN4] They filed a petition for *1318 relief pursuant to the then applicable rule, Ride 20 of the Alabama Temporary Rules of Criminal Procedure, in the Circuit Court of Morgan County on April 4, 1989, raising sixteen principal

claims, some with numerous sub-parts, each challenging either the conviction or the death sentence. They were:

> FN4. This and other courts have repeatedly observed that the practice of large big-city firms of undertaking the representation of individuals charged with and convicted of capital offenses only after they have been convicted, sentenced and had their direct appeals rejected, more often than not represents nothing more than desperate last-minute rescue missions, doomed to failure. Almost always, as here, by the time lawyers from these firms arrive, the result of their efforts is dictated by what has gone before. It is simply a case of too little, too late. May the court respectfully suggest that Johnson's present lawyers would likely have done him more good had they shown up in the Circuit Court of Morgan County, Alabama in March of 1984.

1. The proof at trial failed to demonstrate beyond a reasonable doubt all elements of capital murder. According to Johnson, the State did not:

   (a) prove beyond a reasonable doubt that he was a participant in the shooting of Mr. Cantrell;

   (b) offer any evidence that he had the requisite intent to kill;

   (c) introduce sufficient evidence that the petitioner engaged in a robbery or attempted robbery;

   (d) prove that Johnson's gun could have fired the bullets that killed the victim,

(e) ask Mrs. Cantrell to identify the petitioner, his boots, or his gun;

(f) present evidence that petitioner's gun was fired; or

(g) introduce sufficient evidence to instruct the jury on the theory of complicity.

2. The petitioner received ineffective assistance of trial counsel in a number of respects:

(a) His attorneys failed to:

(1) demonstrate that the State failed to prove that the petitioner intended to kill the victim;

(2) demonstrate that the petitioner was not a participant in the shooting;

(3) demonstrate that the State failed to prove the petitioner's complicity in the killing;

(4) adequately investigate the evidence available to the State to see that the fatal flaw in the State's case was that the petitioner lacked the requisite intent to kill the victim or to aid others in that killing;

(5) demonstrate there was no motive to kill the victim;

(6) adequately cross-examine Mrs. Cantrell to demonstrate that she could not identify the petitioner;

(7) present any analysis of the evidence;

(8) present to the jury any theory consistent with the State's evidence and the petitioner's innocence;

(9) adequately cross-examine David Lindsey to impeach him based on prior convictions;

(10) properly highlight the presence of a third person in the robbery; and

(11) inform the jury that evidence of the petitioner's mere presence at the crime scene was insufficient to convict.

(b) His attorneys failed to request a jury instruction on the lesser-included offense of felony murder and failed to grasp the difference between felony murder and capital murder;

(c) His attorneys failed to file a timely motion to suppress the seizure of the .357 magnum revolver that was found when the petitioner was arrested and introduced into evidence as the gun seen by Mrs. Cantrell in the hand of the "second man";

(d) His attorneys failed to raise intoxication as a basis to negate the intent element required to convict the petitioner of capital murder and failed to request a competency hearing to investigate whether the petitioner's drug addiction foreclosed him from participating in his own defense; and

(e) His attorneys failed to:

*1319 (1) adequately investigate and prepare for trial;

(2) failed to adequately interview key witnesses and potential witnesses;

(3) failed to develop facts concerning the petitioner's drug use, and

(4) failed to investigate the basis for the State's expert-witness testimony.

3. The trial court erred by refusing to provide funds for the appointment of ballistics and glass experts to assist the petitioner in his defense in violation of *Ake v. Oklahoma*.

4. The State failed to disclose exculpatory evidence prior to trial in violation of *Brady v. Maryland*:

(a) that three or four persons were involved in the robbery;

(b) that a suspect had been interviewed and held by the Hartselle Police Department;

(c) that Mrs. Cantrell was asked by the State prior to trial to identify certain persons and items and to identify the petitioner as a participant in the crime; and

(d) that blood was discovered on a post in the living room. which, if it had been disclosed, could have been tested by the petitioner to demonstrate that he was not the "second man."

5. The trial court erred when it overrode the verdict of the jury that Johnson be sentenced to a term of life imprisonment without possibility of parole.

6. The trial court erred when it accepted into evidence certain items which had been seized in violation of the petitioner's Fourth Amendment right to be free of unreasonable searches and seizures. They were:

(a) the bullet that was surgically removed from the petitioner's back against his will; and

(b) the .357 magnum revolver that was seized without a

warrant at the time of the petitioner's arrest and was not in "plain view" but was hidden under a mattress.

7. The prosecutors unconstitutionally removed all black persons from the jury panel in violation of Batson v. Kentucky.

8. The petitioner's appellate counsel was constitutionally ineffective because he failed "to raise numerous meritorious claims that, if raised, would have been grounds for reversal," such as:

(a) the petitioner's trial counsel was ineffective;

(b) the trial court erred by refusing to provide funds in order that Johnson could have obtained the assistance of expert witnesses for the defense;

(c) the State failed to disclose certain exculpatory evidence;

(d) the State's removal of a bullet from the petitioner's back was unconstitutional;

(e) the State's warrantless search and seizure of the gun at the time of the petitioner's arrest was unconstitutional;

(f) the facts found by the sentencing court were not supported by the evidence of record;

(g) the facts stated in the pre-sentence report were inaccurate and not supported by the record;

(h) the trial court erred in finding that there were no circumstances that mitigated against the death penalty;

(i) the trial court unconstitutionally enhanced the petitioner's sentence because he refused to reveal the identities of the other persons present at the crime, in violation of Johnson's right to remain silent:

(j) the trial court's imposition of a death sentence was unconstitutional; and

(k) the State's evidence failed to demonstrate that the petitioner was a participant in the shooting and that the petitioner had the intent to kill.

*1320 9. The trial court judge improperly imposed the death sentence on the basis of facts and inferences not reasonably supported by the record and the trial court judge's written findings of fact show a misunderstanding of the evidence at trial and ignored facts that tended to exonerate the petitioner.

10. The pre-sentence report was inaccurate, prejudicial, and contained facts and inferences about the shooting that were unsupported by the record evidence.

11. The trial court failed to find the existence of mitigating factors when sentencing the petitioner to death, such as the fact that he did not have a significant history of criminal activity, his participation in the crime was minor, his addiction to narcotics, his age, and the jury's recommendation that he be sentenced to life without parole.

12. Johnson's counsel at sentencing were ineffective because they failed:

(a) to present mitigating evidence of the petitioner's severe chemical dependency and its effects on his actions, and failed to present expert medical testimony on that point; and

(b) to object to portions of the pre-sentence report containing factual conclusions about the shooting that were unsupported by any evidence at trial.

13. The trial court judge improperly considered the petitioner's silence to be a nonstatutory aggravating factor and used it to improperly enhance his sentence to death.

14. The imposition of the petitioner's death sentence is unconstitutional because there is no evidence to demonstrate beyond a reasonable doubt that the petitioner intended to kill or was a major participant in the killing of the victim.

15. Alabama's statutory jury override provision is unconstitutional and contains none of the procedural safeguards mandated by the Constitution.

16. The petitioner's sentence was obtained pursuant to a capital punishment statute that is facially unconstitutional because the trial judge in Alabama, not the jury, determines the existence of aggravating factors required for a capital conviction and this deprived the petitioner of his right to have a jury determination on every element required for capital murder.

Johnson's attorneys filed an amended Rule 20 petition on November 9, 1989, raising additional claims: [FN5]

FN5. By this amendment counsel also withdrew the petitioner's Batson claim.

1. The evidence at most demonstrated that the petitioner was a "third man" who entered the Cantrell home after the shootout occurred.

2. The prosecutor improperly argued to the jury that only two men were involved in the shooting when in fact the prosecutor knew or had reason to know there were three men involved and that the other two men, Garland and Wayne McCulloch, did the shooting.

3. The State withheld evidence favorable to Johnson in violation of Brady v. Maryland which showed that Garland and Wayne McCulloch actually shot Mr. Cantrell.

4. The trial court erred by failing to instruct the jury on the lesser- included offense of felony murder.

On March 16, 1990, the Circuit Court of Morgan County denied the Rule 20 petition without a hearing and without specifying the facts upon which it relied. The Court of Criminal Appeals, acting on the joint motion of the parties, remanded the case on April 10, 1990, instructing the trial court to make and enter specific findings of fact. On April 30, 1990, Judge Hundley recused himself from any further participation in the proceedings and Judge John Jolly, a judge of the Circuit Court of Franklin County, Alabama, was designated *1321 to conduct further proceedings on the Rule 20 petition.

Judge Jolly conducted a "summary disposition" hearing on August 29,1990, and a full evidentiary hearing on November 15 and December 17,1990. Before any decision

could be made, however, the petitioner filed yet another amendment to the Rule 20 petition on March 12, 1991, raising three more claims. They were:

1. The trial court erred by improperly instructing the jury on the meaning of "reasonable doubt" in violation of *Cage v. Louisiana*.

2. The State violated *Brady v. Maryland* by failing to disclose statements by potential witnesses which tended to impeach the testimony of David Lindsey, one of the State's key witnesses.

3. The petitioner received ineffective assistance of trial counsel because his attorneys:

(a) failed to object to the jury instructions on the meaning of reasonable doubt;

(b) failed to object to the trial court sending the capital murder and complicity charges to the jury;

(c) improperly stated to the jury that proof of felony murder would support a capital murder conviction;

(d) failed to object to the prosecutor's prejudicial closing argument which misstated the applicable law;

(e) inadequately objected to the State's statistical evidence;

(f) ineffectively cross-examined David Lindsey;

(g) failed to properly argue at the sentencing hearing that the petitioner's participation in the killing was relatively minor;

(h) failed to raise any objections during the sentencing hearing about the trial court's incorrect findings of fact;

(i) failed to argue at the sentencing hearing that the court was required to find the existence of mitigating circumstances;

(j) failed to argue at the sentencing hearing that the petitioner's sentence was unconstitutional because it was based on erroneous findings of fact and an incomplete and misleading pre-sentence report; and

(k) failed to argue at the sentencing hearing that the trial court judge's override of the jury's recommended sentence violated the Alabama Constitution and the United States Constitution.

On May 23, 1991, Judge Jolly denied the Rule 20 petition stating:

> Upon consideration of the pleadings of record, oral testimony and exhibits offered in the hearings held in this cause, legal briefs and legal citations of the respective parties to this proceeding, it is ORDERED, ADJUDGED and DECREED by the Court that the petitioner's Petition for Relief from Conviction and Sentence heretofore filed in this cause on April 3, 1989 is hereby denied and overruled.

On appeal, the Alabama Court of Criminal Appeals again remanded the case to the trial court with directions that it make written findings of fact to support its order denying the Rule 20 petition, as required by Rule 20.9(d) of the Alabama Temporary Rules of Criminal Procedure and the prior order of the appellate court. Judge Jolly filed a more specific order on June 17, 1991, denying the Rule 20 petition, stating:

In response to the joint motion heretofore filed by the respective parties to this proceeding, the Court hereby makes the following specific findings of fact as to the various issues raised by the appellant in his petition:

1. The following claims by the petitioner are procedurally barred as they could have been raised at trial or on appeal:

a. Search and seizure involving the weapon
b. Lesser included offense
c. Reasonable doubt jury instruction
d. Factual basis of sentence findings

*1322 e. Pre-sentence report

f. Statutory mitigating circumstances
g. Intent to kill
h. Jury verdict override provision
i. Sufficiency of the evidence to sustain the conviction of petitioner

j. Search and seizure involving removing the bullet from the petitioner's body

2. In addition, the above claims 1 a-j also lack legal merit.

3. The following claims by the petitioner are not

procedurally barred:

a. Brady v. Maryland claim
b. Guilt stage ineffective assistance claim
c. Appellate level ineffective assistance claim relating to guilt stage issues
d. Sentencing stage ineffective assistance claim
e. Appellate level ineffective assistance claim relating to sentencing stage issues

4. The above claims 3 a-e lack legal merit.

Therefore, it is hereby ORDERED, ADJUDGED and DECREED by the Court that the petitioner's Petition for Relief from Conviction and Sentence heretofore filed in this cause on April 3, 1989 is hereby denied and overruled.

On appeal from the denial of his Temporary Rule 20 motion, Johnson argued:

1. The evidence was insufficient to support the conviction because the State failed to prove every element of capital murder, including arguments:

(a) that the record did not establish Johnson's participation in the crime;

(b) that Mrs. Cantrell did not identify the petitioner as a participant;

(c) that Mrs. Cantrell's testimony established that the petitioner was not the "second man";

(d) that the testimony of David Lindsey was not sufficient to counter the record which showed that the petitioner did not participate in the shooting:

(e) that the State failed to prove intent to kill; and

(f) that the conviction could not be sustained on a mere complicity theory.

2. The State withheld exculpatory evidence from the defense in violation of *Brady v. Maryland* such as:

(a) the investigatory report of the crime prepared by the Alabama Bureau of Investigation which stated that a confidential informant told an investigating officer that Garland and Wayne McCulloch "did the shooting" and that Wayne McCulloch had a .32 caliber gun;

(b) portions of the same document indicating that the victim fired at the robbers first;

(c) documentary evidence that the State was investigation two other suspects;

(d) statements made by witnesses present with petitioner at the McCombs Motel when he allegedly made incriminating statements to Lindsey and when he was later arrested;

(e) other information that could have been used to impeach witness Lindsey; and

(f) information that there were three men at the Cantrell house instead of two as alleged by the prosecutor.

3. The trial court erred by not charging the jury on the lesser-included offense of felony murder.

4. The trial court improperly admitted into evidence items that were unconstitutionally seized, such as the bullet that was surgically removed from the petitioner's back and the .357 magnum revolver that was seized pursuant to an illegal warrantless search at the time of the petitioner's arrest.

5. The trial court erred by not properly instructing the jury on reasonable doubt.

6. The petitioner was denied the effective assistance of trial counsel because his attorneys:

*1323 (a) failed to distinguish between felony murder and capital murder and therefore failed to subject the State's evidence to any meaningful adversarial testing;

(b) failed to argue that the petitioner was not a participant in the shooting;

(c) failed to object to sending the capital murder and complicity charges to the jury;

(d) failed to argue that the petitioner lacked the requisite intent to kill;

(e) failed to request a felony-murder jury charge;

(f) improperly stated to the jury that proof of felony murder would support a capital murder conviction;

(g) failed to object to the prosecutor's improper closing argument concerning a misstatement of the law and facts that were unsupported by the evidence;

(h) inadequately cross-examined witness Lindsey and failed to develop sufficient impeachment material against him;

(i) failed to adequately object to the admission of the State's statistical evidence relating to glass fragments; and

(j) did not file a motion to suppress the .357 revolver that was obtained illegally from a warrantless search.

7. The petitioner received ineffective assistance of appellate counsel because his attorney:

(a) argued only two frivolous grounds with respect to the petitioner's guilt;

(b) merely photocopied his appellate brief to the Alabama Court of Criminal Appeals and labeled it a petition for writ of certiorari, and therefore failed to make any argument to the Alabama Supreme Court;

(c) stated key facts in the brief incorrectly;

(d) failed to distinguish between felony murder and capital murder;

(e) failed to argue the following issues on direct appeal:

(1) the exculpatory nature of Mrs. Cantrell's testimony,

(2) the absence of evidence of specific intent to kill,

(3) there was evidence that the petitioner was not a participant in the killing,

(4) the State's failure of proof,

(5) the trial judge's failure to instruct the jury on felony murder,

(6) the erroneous admission of prejudicial evidence,

(7) the admission of evidence that had been wrongfully seized,

(8) the ineffective assistance of counsel at trial and at sentencing,

(9) erroneous information in the pre-sentence report,

(10) material errors and omissions in the trial court's findings of fact on sentencing,

(11) the failure to account for petitioner's drug addiction in sentencing,

(12) the existence of mitigating factors ignored by the trial judge, and

(13) Alabama's unconstitutional jury override provision.

8. The trial court judge erred by failing to find the existence of statutory mitigating circumstances such as the petitioner's lack of a significant history of criminal activity and minor participation in the crime.

9. The pre-sentence report contained inaccurate and prejudicial facts unsupported by the trial record and failed to include evidence that would have been helpful to the petitioner.

10. The sentence was imposed on the basis of facts and inferences not supported by the record.

11. Alabama's statutory jury override provision is unconstitutional because of the lack of constitutionally required procedural safeguards.

*1324 12. The petitioner was denied the effective assistance of counsel at his sentencing hearing because his attorneys:

(a) failed to present adequate evidence of Johnson's drug use as a mitigating factor;
(b) failed to object to the incorrect statement of facts in the pre-sentence report;
(c) failed to adequately argue as a mitigating factor that the petitioner was, at most, a relatively minor participant in the shooting; and
(d) failed to object that the petitioner was improperly sentenced based on the trial court's incorrect findings of fact.

The Alabama Court of Criminal Appeals affirmed the denial of the Rule 20 petition on September 18, 1992, in a written opinion. Johnson v. State, 612 So.2d 1288 (Ala.Crim.App.1992). The petitioner's application for rehearing was denied on November 13, 1992, and the Alabama Supreme Court denied his petition for the writ of certiorari on February 19, 1993. The record does not suggest that Johnson again sought relief by way of a petition for the writ of certiorari in the United States Supreme Court.

C. The Federal Petition for a Writ of Habeas Corpus.

In the present petition, filed on June 7, 1993, Johnson asserts seven principal grounds for relief. The petition itself is stated in the most conclusory of terms, but adopts specific arguments set forth in the petitioner's Memorandum in Support of Habeas Corpus Petition. Those grounds for relief are as follows: [FN6]

> FN6. The citation following each of the claims for relief refers to the page or pages of the petitioner's Memorandum at which the specific ground is stated.

1. There was insufficient evidence to establish the petitioner's guilt beyond a reasonable doubt. [FN7] Petitioner's

Memorandum at 20-26.

> FN7. Stated differently, the petitioner argues that he was convicted and sentenced to death in violation of the due process clause of the Fourteenth Amendment because there was insufficient proof that he either participated in the killing or had the specific intent to kill.

2. The prosecution withheld material exculpatory evidence prior to trial. [FN8] Petitioner's Memorandum at 26-33.

> FN8. This claim focuses on the prosecution's alleged failure to disclose (1) an A.B.I. (Alabama Bureau of Investigation) investigative report, (2) statements made by several men present in the motel room at the time of the petitioner's arrest, and (3) other documentary evidence implying the existence of other suspects in the crime. See Petitioner's Memorandum at 26-27.

3. The petitioner's trial counsel were ineffective because they:

(a) failed to appreciate the distinction between felony murder and capital murder and, therefore, failed to subject the State's evidence to meaningful adversarial testing in violation of *United States v. Cronic*, Petitioner's Memorandum at 40-42;

(b) failed to comprehend that to convict a defendant of capital murder, the State was required to prove that the defendant intended to murder the victim, and as a result, they:

(1) failed to argue that the petitioner was not a

participant in the shooting, Petitioner's Memorandum at 42;

(2) failed to object to the trial court's instruction to the jury on capital murder and complicity, Petitioner's Memorandum at 42-44;

(3) failed to argue that the petitioner lacked the requisite intent to kill, Petitioner's Memorandum at 44; [FN9]

FN9. This claim includes an argument that counsel failed to argue that the petitioner was not a "participant in the murder," but this aspect of the claim seems merely to repeat the previous claim 3(b)(1) that the petitioner was not a participant.

(4) failed to request that the jury be instructed on felony murder as a lesser-included offense of capital *1325 murder, Petitioner's Memorandum at 45-46;

(5) improperly stated to the jury in closing arguments that proof of felony murder would support a capital murder conviction, Petitioner's Memorandum at 46;

(6) failed to object to the prosecutor's improper closing argument on the law of complicity, Petitioner's Memorandum at 46-48;

(b) inadequately cross-examined witness David Lindsey, Petitioner's Memorandum at 49-50;

(c) failed to raise the proper objection to the State's statistical evidence relating to glass fragments, Petitioner's Memorandum at 50-52; and

(d) failed to file a motion to suppress illegally obtained evidence, Petitioner's Memorandum at 53-55. [FN10]

FN10. This claim relates solely to the seizure of the .357 magnum revolver at the time of the petitioner's

arrest. No argument is directly advanced that counsel were ineffective in any way with respect to their opposition to the surgical removal of the bullet from the petitioner's back. The petitioner does argue that ineffective assistance excuses the procedural default of the claim related to the removal of the bullet.

4. Petitioner was denied the effective assistance of appellate counsel because his appellate attorney:
(a) submitted an inadequate appellate brief containing a 32-page "mish-mash" of facts, omitting some and incorrectly stating others, [FN11] Petitioner's Memorandum at 56-60;

FN11. This claim is, in essence, that the statement of facts in the appellate brief was incompetently drafted because it stated some facts incorrectly and omitted certain other critical facts. For example, the petitioner argues that the brief failed to mention that Mrs. Cantrell's testimony tended to negate the conclusion that petitioner was one of the killers and failed to show the absence of evidence of intent to kill.

(b) failed to argue on direct appeal certain meritorious issues while arguing two frivolous issues related to the petitioner's guilt, [FN12] Petitioner's Memorandum at 60-61; and

FN12. The petitioner points out only in conclusory terms certain issues he contends should have been asserted on direct appeal in lieu of those actually raised. These include the alleged failure of proof that petitioner had the intent to kill, the evidence that the petitioner was not a participant in the killing, the trial court's failure to instruct the jury on felony murder, the trial court's erroneous admission of prejudicial

evidence, the trial court's improper admission of evidence seized unconstitutionally, and the ineffectiveness of trial counsel. The petitioner also contends that appellate counsel failed to appreciate the distinction between capital murder and mere felony murder.

(c) failed to make any argument to the Alabama Supreme Court during its review of the conviction and sentence, Petitioner's Memorandum at 61-62;
5. The trial court failed to instruct the jury on felony murder as a lesser- included offense of the crime of capital murder. Petitioner's Memorandum at 34- 36.
6. The trial court improperly instructed the jury on the definition of reasonable doubt in violation of Cage v. Louisiana. Petitioner's Memorandum at 36-39.
7. The trial court improperly admitted certain pieces of evidence that were obtained in violation of the Fourth Amendment. [FN13] Petitioner's Memorandum at 62-69.

FN13. Under this claim, the petitioner contends that the surgical removal of the bullet from his back and the seizure of the .357 magnum revolver at the time of his arrest both violated the Fourth Amendment prohibition against unreasonable searches and seizures.

Pursuant to the court's order dated June 23, 1993, the respondents filed a habeas corpus checklist on July 22, 1993, attaching numerous documents and records from the state-court proceedings, and filed a brief on August 23, 1993. The petitioner filed responses on September 21, 1993, and September 22, 1993. A hearing was conducted *1326 on October 27, 1993, by United States Magistrate Judge Paul W.

Greene to determine whether the petitioner and his counsel were aware of the substantial procedural barriers to habeas corpus review in a subsequent petition and the necessity of presenting all claims in a single petition.

The petitioner filed a response on June 6, 1994, and the respondents filed a response on July 18, 1994. By order dated June 29, 1994, the court requested from the parties their views regarding the necessity for an evidentiary hearing. The petitioner filed a response on July 22, 1994, asserting that an evidentiary hearing was necessary only "for the court to hear expert testimony that would establish for this federal record standards of counsel effectiveness in death penalty cases that prevail in Alabama state courts." By order dated August 10, 1995, the court determined that it could address all of the claims presented in the habeas corpus petition on the basis of the state court record without holding an evidentiary hearing. That order also directed the respondents to file an answer to the petition for writ of habeas corpus along with a brief addressing issues of law. The respondents filed an answer to the petition on October 2, 1995.

By order of January 16, 1996, the court set an evidentiary hearing for February 29, 1996, on the " narrow factual issue" concerning "what petitioner told counsel about the crime and his role in it in order to assess whether their strategic and tactical choices were reasonable in the light of the information known to them." On February 12, 1996, the petitioner filed a motion for reconsideration to set aside the order setting a hearing, which was denied on February 13, 1996. On February 20, 1996, the petitioner "appealed" the order setting the evidentiary hearing to the Eleventh Circuit Court of Appeals, and also moved that court to stay this court's order setting the evidentiary hearing. By order of February 28, 1996, the Eleventh Circuit stayed the order setting the hearing and directed this court to conduct an in

camera hearing in order "to determine whether and to what extent appellant's communication presumptively protected by the attorney-client privilege is relevant to the specific ineffective assistance of counsel claims raised by appellant in his habeas petition."

An in camera hearing was conducted on February 29, 1996. By order dated March 1, 1996, the petitioner's trial attorneys were directed to file under seal all materials that contained communications from the petitioner to them concerning his knowledge of or participation in the events surrounding the robbery and murder, and another in camera hearing was scheduled for March 19, 1996. On March 7, 1996, the petitioner's trial attorneys filed the requested documents under seal. The petitioner again "appealed" to the Eleventh Circuit Court of Appeals, seeking to stay the hearing that was then scheduled for March 19, 1996. On March 7, 1996, the Court of Appeals denied the petitioner's motion for stay, stating: "Given trial counsel's apparent failure of memory, the district court's decision to order production under seal of trial counsel's notes for purposes of the in camera relevance hearing is reasonable and necessary." This court then proceeded with the hearing. [FN14]

FN14. This court has yet to hear any adequate explanation of the jurisdictional basis upon which the Eleventh Circuit undertook to review the trial court's conduct of this evidentiary hearing and to direct the manner in which that hearing would be conducted. In the real world state habeas petitioners usually strive mightily to induce the federal district court to allow an evidentiary hearing. Here, however, Johnson's counsel wanted no part of any such hearing. Their reasons became obvious as a result of the information revealed at that hearing. Trial counsel's testimony made it clear that what Johnson had told his attorneys

about his personal participation in the robbery and murder of Mr. Cantrell completely refuted his present attorneys "fictionalized" account of his participation, upon which most of their present arguments are founded. See infra at pp. 1343-44. It is fair to say that present counsel would, if they could, simply rewrite the "facts" to suit their own concept of the manner in which Johnson's trial attorneys should have conducted themselves. Most disturbing perhaps is that the hearing revealed that present counsel were aware as early as 1988, before they filed their first Rule 20 petition, that Johnson had told his trial attorneys that he was, in fact, present at and participated in the robbery; that he personally fired shots at Mr. Cantrell; and that he was himself wounded by Mr. Cantrell. For present counsel to claim in post-conviction proceedings that petitioner was actually innocent, and that this would have become clear at trial if only the trial attorneys had made the right arguments is, at best, disingenuous. The best counsel could do was what they did--put the State to its proof. In an effort to avoid having the true facts revealed, habeas counsel "appealed" this court's order setting the limited evidentiary hearing and the Eleventh Circuit, with no explanation of its jurisdiction, entered an order first staying the hearing and then directing this court to conduct an in camera hearing to determine whether and to what extent Johnson had waived his attorney client privilege by attacking the competency of his attorneys. This court, of course, recognizes that the appellate court could have treated the "appeal" as a petition for the writ of mandamus, though it was not so styled. But if that is what it did, wherein did it find that this court had abused its discretion by setting a hearing, or conclude that petitioner was clearly entitled to stop the court and the State from

determining what information trial counsel had in hand so that a realistic assessment could be made of whether they conducted themselves reasonably in light of that information?

*1327 On April 10, 1996, the petitioner filed a response to the respondent's memorandum dated April 1, 1996. On October 20, 1997, the petitioner filed a motion to amend his reply brief in support of the petition in order to add as an additional cause of the claimed ineffectiveness of counsel that trial counsel did not permit the petitioner to testify at trial. [FN15] On March 20, 1998, the court denied the motion to amend.

FN15. Given what we now know that Johnson had told his lawyers about his active participation in the robbery and murder of Mr. Cantrell, this claim, had the amendment been allowed, would have been farfetched at best. First, it is clear that Johnson emphatically had told his lawyers that he would not testify. Second, he could not have testified consistently with his statements to his lawyers without confessing, on the witness stand and under oath, to capital murder. Finally, the court trusts that habeas counsel would not now suggest that Johnson's trial counsel should have participated in some contrived testimony from him that would have had the effect of exonerating him.

II. Analysis of the Claims.

A. Introduction.

[1] A state prisoner "in custody in violation of the Constitution or laws or treaties of the United States" may petition an appropriate court of the United States for a writ of habeas corpus to obtain release from his or her unlawful confinement. 28 U.S.C. § 2254(a); [FN16] *See Brown v. Allen*, 344 U.S. 443, 485, 73 S.Ct. 397, 407-08, 97 L.Ed. 469 (1953). The writ exists as the appropriate cause of action for a state prisoner seeking to challenge in federal court the "fact or length" of his confinement. Wilson v. Foti, 832 F.2d 891, 892 (5th Cir.1987).

FN16. 28 U.S.C. § 2254(a) reads:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

The petition for the writ of habeas corpus in a federal court is a collateral attack on the finality of state court proceedings on a matter largely of state concern. *See In re Kaine*, 55 U.S. 103, 113-14, 14 How. 103, 14 L.Ed. 345 (1852). Therefore, review of a state court judgment is limited in scope because of demanding interests in federalism and the finality of judgments. *See Coleman v. Thompson*, 501 U.S. 722, 748, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991) (" '[T]he Great Writ entails significant costs.' ... The most significant of these is the cost to finality in criminal litigation that federal collateral review of state convictions entails"); *Frank v. Mangum*, 237 U.S. 309, 329, 35 S.Ct. 582, 590, 59 L.Ed. 969 (1915) ("[W]here ... a criminal prosecution has proceeded through all the courts of the state, including the appellate as well as the trial court, the result of *1328 the

appellate review cannot be ignored when afterwards the prisoner applies for his release on the ground of a deprivation of Federal rights sufficient to oust the state of its jurisdiction to proceed to judgment and execution against him. This is not a mere matter of comity, as seems to be supposed. The rule stands upon a much higher plane, for it arises out of the very nature and ground of the inquiry into the proceedings of the state tribunals, and touches closely upon the relations between state and Federal governments.").

To obtain a writ of habeas corpus on a federal claim, a petitioner must overcome a number of procedural and substantive hurdles. These hurdles serve to ensure that the principles of federalism and finality are served by giving state courts due deference in the resolution of habeas claims. First, the petitioner must not have procedurally defaulted his federal claims in the state courts. *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). The petitioner must give the state courts a full and fair opportunity to consider all of his claims of error, including federal constitutional claims. *See also Stone v. Powell*, 428 U.S. 465, 494 n. 35, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976) ("Despite differences in institutional environment and the unsympathetic attitude to federal constitutional claims of some state judges in years past, we are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States. State courts, like federal courts, have a constitutional obligation to safeguard personal liberties and to uphold federal law"). A procedural default occurs when a federal claim is not raised in such a way as to permit full review by the courts of the state. A habeas petitioner who has failed to follow a state's procedural rules in presenting his or her federal claims and for that reason is barred from presenting those claims to the appellate courts of the state will also be barred by the procedural default rule from

pursuing those claims on collateral review in federal court. *Wainwright*, 433 U.S. at 82, 97 S.Ct. 2497. However, if a petitioner defaults on his federal claim in state court, he may nonetheless be heard on that claim in federal habeas court if he either "can show 'cause' for the procedural default and 'prejudice attributable thereto,' *Murray v. Carrier*, 477 U.S. 478, 485, 106 S.Ct. 2639, 2644, 91 L.Ed.2d 397 (1986), or demonstrate that failure to consider the federal claim will result in a 'fundamental miscarriage of justice.' *Id.* at 495, 106 S.Ct. at 2649, quoting *Engle v. Isaac*, 456 U.S. 107, 135, 102 S.Ct. 1558, 1576, 71 L.Ed.2d 783 (1982)." *Harris v. Reed*, 489 U.S. 255, 262, 109 S.Ct. 1038, 1043, 103 L.Ed.2d 308 (1989). [FN17] *See also Wainwright*, 433 U.S. at 90- 91, 97 S.Ct. 2497.

> FN17. These exceptions will be discussed in greater detail infra where applicable to particular claims of the petitioner.

Second, the petitioner must exhaust the claim in the courts of the state before the district court can address the claim. *See Rose v. Lundy*, 455 U.S. 509, 515, 102 S.Ct. 1198, 1202, 71 L.Ed.2d 379 (1982); *see also Ex parte Royall*, 117 U.S. 241, 250-53, 6 S.Ct. 734, 29 L.Ed. 868 (1886). A claim is exhausted if it either has been addressed by or was before the highest state appellate court authorized to hear the claim on its merits or if there no longer exists any available remedy in the state courts. *Lundy*, 455 U.S. at 515-16, 102 S.Ct. 1198.

Finally, as a substantive matter, in addressing a habeas claim the district court must generally defer to the factual findings of the last state court to address the claim. *See, e.g., Sumner v. Mata*, 449 U.S. 539, 101 S.Ct. 764, 66

L.Ed.2d 722 (1981). Only in certain limited and defined circumstances will a federal court be permitted to disregard factual findings made by the state courts.

*1329 B. Intent, Participation, and the "Third Man" Defense.

As Assistant Attorney General, now Circuit Judge, Edward Carnes aptly observed, "[t]his case ... is in a very unusual posture, because the great majority of the issues raised ... are based upon the Petitioner's present counsel['s] assertion" of an entirely new version of the events of March 11, 1984. Record of Petitioner's Rule 20 Proceedings ("R20") at 1713-1714. Specifically, petitioner now suggests (or at least claims that his trial attorneys should have argued) that he was not one of the two robbers described by Mrs. Cantrell at trial. According to petitioner, the evidence supports the conclusion that he was instead a "third man," involved in the robbery but not in Cantrell's murder, who entered the house during a lull in the shooting just in time to be caught in the back by the dying Mr. Cantrell's last shot. This new conception of events has wound its way into almost every argument in this case. In an attempt to untangle the resulting knots, the court will discuss the question of intent and petitioner's so-called "third man" theory generally before turning to individual analyses of the many issues in which this theory plays a central role.

Petitioner's arguments are built upon a nuance in Alabama's capital murder scheme. To put the matter simply, in Alabama the age-old felony murder *doctrine does not apply in capital cases. See*, e.g., Lewis v. State, 456 So.2d 413, 416 (Ala.Crim.App.1984) ("[N]o defendant is guilty of a capital offense unless he had an intent to kill, and that intent to kill cannot be supplied by the felony murder doctrine."). Alabama law does list robbery as one of the

circumstances which will elevate a murder to capital offense status. See § 13A-5-40(a)(2). However, mere participation in a robbery which leads to a killing is not sufficient for a capital conviction. Alabama's capital murder statute applies only when the defendant is guilty of an intentional murder. *See Ex parte Murry*, 455 So.2d 72, 74 (Ala.1984).

In this case, the State acknowledges that Mr. Cantrell was actually killed by the unidentified first man, not the petitioner. *See, e.g.*, R20 at 1714-15. The murder element of Johnson's capital charge can be met by proof of complicity in an intentional murder carried out by another, but this requires more than proof of joint participation in a robbery. "[T]he accomplice liability doctrine may be used to convict a non-triggerman accomplice if, but only if, the defendant was an accomplice in the intentional killing as opposed to being an accomplice merely in the underlying felony. An accomplice to the intentional killing is one who aids and abets the killing by any assistance rendered through 'acts or words of encouragement or support or presence, actual or constructive, to render assistance should it become necessary.' ... [T]here must be sufficient evidence from which a rational jury could conclude that the defendant possessed [a 'particularized intent'] to kill." *Ex parte Raines*, 429 So.2d 1111, 1112-13 (Ala.1982), *cert. denied*, 460 U.S. 1103, 103 S.Ct. 1804, 76 L.Ed.2d 368 (1983) (quoting *Ex parte Ritter*, 375 So.2d 270, 274 (Ala.1979)). Thus, in order to convict Johnson, the State was required to prove that he, with an intent to kill, aided another in killing Mr. Cantrell. [FN18] *See Russaw v. State*, 572 So.2d 1288, 1292-93 (Ala.Crim.App.1990). Petitioner claims that his attorneys failed to challenge this weak link in the State's case, and that if pressure had properly been brought to bear on this issue a capital conviction could have been avoided.

FN18. Alabama's imposition of the death penalty for

aiding and abetting a capital murder appears to satisfy the Eighth Amendment's cruel and unusual punishment clause. *See Bush v. Singletary*, 988 F.2d 1082, 1086-88 (11th Cir.1993) (discussing Florida's similar capital aiding and abetting scheme); *Tison v. Arizona*, 481 U.S. 137, 158, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987).

The State's proof of intent took the form of evidence that the petitioner participated *1330 in a shoot-out in which Mr. Cantrell was killed. This evidence was of two kinds. First, the State put Lindsey on the stand to testify that the petitioner had admitted to shooting and perhaps wounding a robbery victim. Second, and more importantly for our purposes, the State attempted to identify Johnson as the second robber in the Cantrell home, and then put on testimony from Mrs. Cantrell that this robber had shot at her husband. As the Alabama Court of Criminal Appeals observed in its decision on Johnson's Rule 20 petition, proof that Johnson was the second robber would clearly satisfy the capital murder requirements. "While the shots of the second 'masked' robber were not the shots that killed the victim, there was no reasonable basis for the jury to doubt that the second robber had the intent to kill, attempted to kill, and actively participated in the killing." *Johnson v. State*, 612 So.2d 1288, 1298 (Ala.Crim.App.1992); *see also Smith v. State*, 745 So.2d 922, 1999 WL 339272 (Ala.Crim.App. May 28, 1999); *Watkins v. State*, 495 So.2d 92, 102- 03 (Ala.Crim.App.1986) (finding the required participation and noting that " 'community of purpose may be formed in a flash' "). Many of petitioner's arguments before this court boil down to a claim that his trial attorneys could have and should have challenged the State's contention that he was that second robber, and so put the State to its proof on the

question of his intentional participation in Mr. Cantrell's murder.

As petitioner correctly notes, the State had ample physical evidence that he was present at the scene but little solid evidence pointing to him as the second robber. Mrs. Cantrell did not recognize Johnson, and indicated only that he was about the same height and build as the second robber. Also, while Johnson's brown boots and "shiny" gun matched Mrs. Cantrell's general description of the second robber, she never identified these rather common objects as the ones she saw the night of the murder. Thus the State's main argument on this point was simply that Johnson was there, and there were only two men, so he must have been the second man.

This, of course, is where the petitioner's new "third man" theory comes into the picture. According to Johnson, the evidence at trial could be interpreted to indicate that there were three robbers on the scene, and that Johnson was not the second but the third man to enter the Cantrell home. If so, a properly instructed jury might conclude that he did not participate in the shoot-out with Cantrell, find evidence of intentional murder lacking, and opt instead for felony murder, a non-capital offense.

The petitioner bases this theory primarily on discrepancies in Mrs. Cantrell's testimony at trial. Her testimony was a bit confused and difficult to follow, as well as inconsistent with the physical evidence in some significant respects. [FN19] However, her story was essentially this. Two intruders pushed past her into the house. The first man in the door turned over a couch in the living room and took up a position behind it. Mrs. Cantrell fell to the floor at her husband's feet and was unable to see much of anything after that point, so the second man's location during the shooting is unclear. After a brief verbal exchange between her husband and the intruders, the second man opened fire. A barrage of

shots was exchanged, followed by quiet. The first man said "come on in Bubba, I have got him." Trial Record ("Tr.") at 387-88. Just after that, Mr. Cantrell got off one last shot. Mrs. Cantrell heard a man say "Oh!," Tr. at 366-67, then heard shuffling as if "they were trying to help him out" Tr. at 368. After that,

> FN19. For example, while she testified that the second robber was the only one of the two who fired, both sides appear to agree that it was in fact the first man in the door who shot and killed Cantrell. Likewise, there are some minor internal inconsistencies in her story. Compare, e.g., Tr. at 388 (first man said "we have got him") with Tr. at 364 (first man said "I have got him") and Tr. at 364, 383-84 (first shot fired before victim spoke) with Tr. at 391 (first shot fired after victim spoke).

*1331 A: It didn't take them long ... to start moving over further towards the door.

Q: Further towards the door?
A: That is right.
Q: So neither one of them was at the door when your husband fired the last shot?
A: No, they wasn't.
Q: They were not?
A. No.

Tr. at 386. Mrs. Cantrell speculated that the men "were probably going through things, looking for things." Id. Then they left.

According to petitioner, trial counsel overlooked a critical feature of Mrs. Cantrell's testimony--she placed the two intruders away from the door when the last shot was fired and one of the intruders was hit. This is important,

Johnson claims, because the State's evidence that Johnson was present at the scene was based largely on a bullet which allegedly went through the door and hit him. Thus if both Mrs. Cantrell's testimony and the State's physical evidence were believed, Johnson could not be the second man. The petitioner further contends that other evidence could be drawn upon to support this conclusion, including (1) Lindsey's testimony that Johnson had gone with "some friends," i.e. more than one, to get money; (2) other police information that more than two people were involved in the robbery; (3) the position of the bullet wound on the right side of Johnson's back, consistent with coming in the door, not going out; and (4) the timing of the lull in shooting, the first man's direction to "come on in," and Cantrell's last shot.

With these finishing touches, Johnson's story would go something like this. He and several others went to rob the Cantrells. He waited outside while two other men went in. They shot Cantrell, and thinking the fight was over called Johnson in. As he walked in, he was hit in the right side of his back by Cantrell's dying shot.

The court acknowledges that, if the spotlight is narrowly focused on Mrs. Cantrell's trial testimony, it reveals a conflict within the State's own evidence. This flaw was not fatal to the State's case, however. The balance of the available evidence, including Johnson's own rendition of events to his lawyers, points to two intruders with Johnson as the second man. [FN20] Because of the other evidence the State had available, if Johnson's lawyers had tried to exploit the problems with her testimony they would have had little to work with. For the reasons set out below, the court concludes that a third man defense would not have significantly strengthened Johnson's case, and that Johnson suffered no constitutional deprivations for want of such a defense.

FN20. It appears that Johnson and another man went into the house, while one or two others waited outside with a car.

The court now turns to petitioner's specific assignments of error predicated on the "third man" theory and the question of intent.

1. Sufficiency of the Evidence.

The petitioner argues that the State failed to satisfy its burden to prove his guilt beyond a reasonable doubt at trial. He argues in particular that the evidence adduced at trial (1) fails to demonstrate that he was a participant in the murder of Mr. Cantrell and (2) does not demonstrate that he had the requisite intent to kill or aid another in killing required under the capital murder statute. These claims are substantially the same, in essence being that although petitioner was present at the scene and a participant in the robbery, he did not have the required level of participation in the actual murder to be found guilty of a capital crime.

i. Procedural Default on the Sufficiency of the Evidence Claim.

The State first contends that the claim is procedurally barred because the matter was not raised on direct review to the Alabama Court of Criminal Appeals. *1332 This court agrees. While petitioner's appellate counsel attacked the sufficiency of the evidence regarding Johnson's presence at the scene on direct appeal, no mention was made of the intent element and counsel certainly did not advance the third man theory petitioner now relies on for consideration by the state appellate courts. In its opinion on the appeal from the denial of the Rule 20 petition, the Alabama Court of Criminal

Appeals held that it was barred from reviewing these portions of the sufficiency of the evidence claim. "We ... hold that to the extent that this claim differs from the insufficiency of evidence issue asserted on direct appeal, this claim is procedurally barred from review under Rule 20.2(a)(5), A.R.Cr.P.Temp., because it could have been but was not raised on appeal." *Johnson*, 612 So.2d at 1292. Because the claim was not properly asserted or addressed on appeal, the claim was defaulted. [FN21] *See Wainwright*, 433 U.S. at 82, 97 S.Ct. 2497; *cf. Hart v. Estelle*, 634 F.2d 987 (5th Cir.1981) (exhaustion requirement not satisfied if "a different legal theory" or an "entirely new factual claim [ ]" is presented in federal court). It therefore cannot properly be considered by this court.

FN21. The petitioner seeks to excuse this default based upon (1) ineffective assistance of counsel in failing to raise the issue at trial and on appeal; (2) Alabama's failure to adhere to its own default rules as exemplified in *Blount v. State*, 572 So.2d 498 (Ala.Crim.App.1990) and *Falkner v. State*, 586 So.2d 39 (Ala.Crim.App.1991); and (3) the actual innocence exception to procedural default. Plaintiff's first claim is essentially subsumed in his ineffective assistance claims, as only defective performance satisfying Strickland's test will provide cause for default. *See Jackson v. Herring*, 42 F.3d 1350, 1361 (11th Cir.1995). The court will therefore discuss this argument in conjunction with plaintiff's other ineffective assistance claims. Plaintiff's actual innocence contentions will likewise be dealt with below. Plaintiff's third argument is not well taken. Blount and Falkner simply demonstrate the application of an exception to Alabama's default rules for claims which could not practically have been

brought previously. It is a state's prerogative to fix the contours of its procedural rules, and federal courts must accord these rules the proper respect so long as they are applied consistently. The mere existence of established exceptions to more general rules does not demonstrate that they have not been, nor may this court second-guess the Alabama courts' interpretation of their own rules.

ii. Merits of the Claim.

Alternatively, the court finds plaintiff's sufficiency of the evidence claim unpersuasive on the merits.

First, the court acknowledges the limited role a habeas court may play in weighing the constitutional sufficiency of the evidence in a state criminal prosecution. *See, e.g., Martin v. State of Alabama*, 730 F.2d 721, 724 (11th Cir.1984). The sole question to be determined is whether, after reviewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the petitioner guilty beyond a reasonable doubt. [FN22] *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560, *reh'g denied*, 444 U.S. 890, 100 S.Ct. 195, 62 L.Ed.2d 126 (1979). The State is not required to rule out every hypothesis except that of the guilt of the defendant. *Jackson*, 443 U.S. at 326, 99 S.Ct. 2781; *Martin*, 730 F.2d at 724. When the record reflects historical facts which support conflicting inferences, there is a presumption that the jury resolved those conflicts in favor of the prosecution and against the defendant. In other words, the federal courts must defer to the judgment of the jury in assigning credibility to the witnesses and in weighing the evidence. *See Jackson*, 443 U.S. at 326, 99 S.Ct. 2781; *Wilcox v. Ford*, 813 F.2d 1140 (11th Cir.1987). The court's decision making process on the sufficiency of the evidence question is informed by reference

to the essential elements of the crime for which the petitioner was convicted as defined by state law. *Wilcox*, 813 F.2d at 1143 (citing *1333 *Jackson*, 443 U.S. at 324 n. 16, 99 S.Ct. 2781); *Buffo v. Graddick*, 742 F.2d 592, 595 (11th Cir.1984).

FN22. Due process requires the state to prove each element of the offense beyond a reasonable doubt. *Bishop v. Kelso*, 914 F.2d 1468, 1470 (11th Cir.1990) (citing *Jackson*, 443 U.S. at 316, 99 S.Ct. 2781).

The evidence presented at trial was adequate to prove that petitioner was present and that he intended to help his associate kill Mr. Cantrell. The state presented a strong case that Johnson was present at the scene of the crime. Evidence at the scene indicated that a bullet had been fired by the victim and had passed through a pane of glass in the carport door, only to disappear. A bullet, of the type used by the victim and with markings matching the type of gun used by the victim, was recovered from the petitioner's back. The bullet wound location was consistent with the trajectory of the missing bullet, and fragments of glass found in the head of that bullet matched the physical characteristics of the window pane the shot passed through. This set of coincidences was not explained by any other evidence in the record, and thus alone was sufficient to allow a reasonable juror to infer beyond a reasonable doubt that Johnson was present during the gun-fight which led to Mr. Cantrell's death.

While the state's proof of Johnson's intent and participation in the murder was not quite so iron-clad, it too was constitutionally sufficient. The most important evidence allegedly came from the mouth of Johnson himself. David Lindsey testified that Johnson visited his home the day after Mr. Cantrell was murdered. According to Lindsey, Johnson

had with him a "shiny" .357 Magnum [FN23] matching the description of the gun carried by one of Cantrells' killers. The next morning, Lindsey drove the petitioner to a motel in Oxford, Alabama, where they met some of Johnson's friends. Lindsey testified that Johnson told them that he "had to get the hell out of Hartselle." He also stated that he and others had gone into a place to get some gold and that his buddy had been shot. According to Lindsey, appellant stated, "I got shot, but I got off a couple of rounds, and I believe I got that son of a bitch." The jury was entitled to, and apparently did, believe Lindsey's testimony. The record therefore contains what amounts to an admission by the petitioner that he participated in an intentional killing. In light of the other evidence, a jury could readily conclude that it was Mr. Cantrell's murder which Johnson was describing. In the court's view, this evidence, along with that already outlined above, was sufficient to support the jury's finding that Johnson was guilty of capital murder.

> FN23. This testimony was partially corroborated by the introduction at trial of a nickel-plated Ruger .357 Magnum found in the petitioner's possession a few days after the killing. Johnson's gun, when found, had only three rounds in it, again consistent with the three rounds apparently fired by the intruder near the carport door. See infra.

Nor is the court persuaded that Mrs. Cantrell's testimony barred such a conclusion. Mrs. Cantrell's testimony does suggest that only one of the two intruders she saw shot at her husband, and that neither of these two were behind the carport door when her husband apparently fired at and hit the petitioner. The significance of this testimony is undermined, however, by the physical evidence. Mrs. Cantrell's testimony

was, frankly, inconsistent with that evidence in a number of respects. The evidence indicated that an active gun battle was waged between the victim and not one but two intruders. More significantly, a number of shots from both sides passed through the carport door, indicating that one of the intruders must have been firing from behind the door during part of the gunfight. [FN24] As discussed above, one of the victim's shots through the door apparently struck Johnson, allowing a jury to infer that he was the shooter behind the door. *1334 No evidence, except Mrs. Cantrell's confused testimony, suggests otherwise. Indeed, the other physical evidence [FN25] and Johnson's statements to Lindsey are entirely consistent with this conclusion. Therefore the jury was entitled to overlook any inconsistencies in Mrs. Cantrell's testimony, and base its findings regarding the petitioner's participation on the substantial remaining evidence instead.

FN24. The evidence suggests that an intruder fired two shots at the victim through the door and another from a position near the door. This was also apparently petitioner's trial counsel's understanding of the facts. See R.20 at 759 (DiGiulian testified in a deposition that "there was one man standing in full view. The back door was open and one man was partially behind that back door shooting around the door.").

FN25. For example, petitioner points out that the location of his bullet wound on his right mid-back indicates that he could not have been leaving the house when he was hit. Therefore, according to petitioner, he must have been shot while coming in after the fight was almost over. However, the wound location is also consistent with the theory that the

petitioner had taken up a position behind the door during the fight. Thus petitioner's argument does not place in doubt the conclusions suggested by Lindsey's testimony and the other evidence. Likewise, petitioner's counsel make much of the use of the pronoun "we" in the phrase "come on in, we have got him." Petitioner claims that this suggests that the first two men had killed Cantrell, and were calling a third man into the house from outside. The court does not find this choice of words particularly significant, as "we" could as easily mean you and I, and so be used by one of the two intruders in speaking to the other.

The court is satisfied that, on this evidence, the jury was justified in finding beyond a reasonable doubt that the petitioner, Anthony Keith Johnson: (1) was present at the scene of the robbery and murder of Kenneth Cantrell; (2) knowingly and willfully participated in the robbery; (3) fired his firearm at Mr. Cantrell; and (4) intended to kill him. Moreover, this evidence justified the jury in finding that if the bullets fired by Johnson did not strike and kill Mr. Cantrell, bullets fired by one or more of his companions accomplished the victim's death and that Johnson had intended and participated in the killing.

2. Ineffective Assistance of Counsel.

Petitioner advances a number of ineffective assistance of counsel claims, most related in some manner to his "third man" theory.

i. Claims of Ineffective Assistance at Trial Generally.

Johnson contends that the performance of his trial attorneys was so deficient that he was denied the effective

assistance of counsel guaranteed him by the Sixth Amendment to the United States Constitution. First, he argues that overall his trial attorneys were so hapless as to render "the adversary process itself presumptively unreliable." *United States v. Cronic*, 466 U.S. 648, 659, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). He also finds fault with his trial attorneys for committing many specific errors, each purportedly growing out of their misapprehension of the elements necessary to his conviction of capital murder and their related failure to recognize the possibilities of a "third man" defense. The grounds asserted include counsel's failure (1) to argue that he was not a participant in the shooting, but was instead a "third man"; (2) to object to the submission of improper jury instructions on capital murder and complicity to the jury; (3) to argue that the State had not proved Johnson intended to kill Mr. Cantrell; (4) to request a felony murder jury instruction; and (5) to object to the prosecutor's closing argument; as well as (6) counsel's improper concession on closing argument that Johnson would be guilty of capital murder if he was merely present at the robbery and murder of Mr. Cantrell.

The Supreme Court has stated that, under the Sixth Amendment, a defendant has not only the right merely to have counsel at a criminal trial, but the right to counsel that provides him or her with effective assistance. There are two grounds upon which a claim of ineffective assistance of counsel can be advanced. First, a petitioner can argue, under *United States v. Cronic*, 466 U.S. 648, 658, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984), that "circumstances ... are so likely to prejudice the accused" that the counsel provided is presumptively ineffective. The petitioner also has the option of arguing that specific errors of counsel *1335 at trial were sufficiently serious that the attorneys were not acting as competent counsel and that those errors prejudiced the

petitioner. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

ii. Counsel's Alleged Failure to Understand an Essential Element of Capital Murder.

Many of Johnson's claims of ineffectiveness hinge on important factual allegations--that his attorneys failed to understand the intent and participation elements of capital murder and failed to recognize the significance of Mrs. Cantrell's trial testimony, and so failed to craft an effective defense. Because of their failures, trial counsel advanced a flimsy defense--that the petitioner was not present at the scene of the crime--rather than a stronger defense based upon the petitioner's lack of intent to kill and his non-participation in the robbery and murder. Whether asserted under the rubric of Cronic or Strickland, most of petitioner's claims are thus at bottom the same: His attorneys' failure to understand the law and facts applicable to his case was unacceptably poor performance, and denied him the right to counsel. The court will therefore evaluate these factual allegations before turning to petitioner's more specific assignments of error.

In evaluating factual questions this court does not write on a blank slate. Alabama's courts have made factual findings in their review of Johnson's post-conviction claims, and the court owes those findings a "high measure of deference." *Marshall v. Lonberger*, 459 U.S. 422, 432, 103 S.Ct. 843, 74 L.Ed.2d 646 (1983). This court must accord such findings a presumption of correctness unless one or more of the exceptions listed in 28 U.S.C. § 2254(d) is found applicable. [FN26] *See Sumner v. Mata*, 449 U.S. 539, 551, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981); *Williams v. Turpin*, 87 F.3d 1204, 1208 (11th Cir.1996); *McBride v. Sharpe*, 25 F.3d 962, 971 (11th Cir.1994) (en banc); and *Griffin v. Wainwright*, 760 F.2d 1505, 1510 (11th Cir.1985). The Rule 20 court made no explicit written findings of fact on whether

trial counsel comprehended the intent requirement of capital murder under Alabama law. The presumption of correctness, however, attaches not only to findings of fact made by the trial court that conducted the evidentiary hearing concerning the petitioner's ineffective assistance claim, but also to factual findings made by an appellate *1336 court of the State with access to the record of the hearing on the claim. *Sumner*, 449 U.S. at 545-46, 101 S.Ct. 764; *Jones v. Jones*, 938 F.2d 838, 842-43 (8th Cir.1991).

FN26. In April of 1996, the Congress enacted the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") which inter alia amended 28 U.S.C. § 2254 to provide that "a determination of a factual issue made by a State court shall be presumed to be correct" unless rebutted by the petitioner "by clear and convincing evidence." It is reasonably clear, however, that the provisions of that act do not apply retroactively to this habeas corpus proceeding. In *Lindh v. Murphy*, 521 U.S. 320, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997), the United States Supreme Court held that the amendments to Chapter 153 of Title 28, United States Code, which includes 28 U.S.C. § 2254, do not apply retroactively to noncapital habeas cases. The court reasoned that Congress did not indicate an intent to make the Chapter 153 amendments apply retroactively because it was silent as to that chapter while explicitly providing that the new Chapter 154, dealing specifically with habeas corpus proceedings in capital cases, would be applied to pending petitions. The court noted that some parts of Chapter 154 specifically refer to and incorporate provisions of Chapter 153, most notably 28 U.S.C. § 2264(b). This court notes that, by its explicit terms, Chapter 154 applies only to habeas corpus

proceedings in capital cases where the provisions of Section 2261(b) and (c) are met. Those sections set out specific requirements regarding provisions for the appointment of counsel for indigent prisoners sentenced to death whose convictions and sentences have been affirmed on direct appeal. There is nothing in this record to suggest, and the State of Alabama has not asserted, that it has satisfied the requirements of Section 2261(b) and (c) and is entitled to the benefits of the AEDPA. In any event, the court has decided the issues in this case under the prior law, they generally being more favorable to the petitioner than that established by AEDPA. The court is satisfied that AEDPA does not aid the petitioner. *See Hays v. Alabama*, 85 F.3d 1492, 1495 n. 1 (11th Cir.1996), *cert. denied*, 520 U.S. 1123, 117 S.Ct. 1262, 137 L.Ed.2d 341 (1997). Thus, the relevant statutory provisions are cited as they existed before AEDPA's effective date.

The Alabama Court of Criminal Appeals explicitly found that "[t]rial counsel was [sic] aware that intent to kill was a required element of the capital offense." *Johnson*, 612 So.2d at 1298. That court also determined more broadly that "counsel made a reasoned, strategic decision not to argue ... that Johnson was present but did not intend that the victim be killed" based on a desire to avoid arguing to the jury in the alternative and "counsel's judgment that, as a practical matter, there was little or no chance that the jury would fail to find ... intent to kill if [it] concluded that he had been at the scene." Id. at 1296.

This court is bound by these findings unless petitioner can show by clear and convincing evidence that the state court's determination was not "fairly supported by the record." 28 U.S.C. § 2254(d); *Griffin*, 760 F.2d at 1510. This

court is not at liberty to disregard the state court's factual finding simply because, were the question before this court in the first instance, it might have resolved it differently. Before ignoring such findings, a federal court must do "more than simply disagree with the state court before rejecting its factual determinations," but must instead "conclude that the state court's findings lacked even 'fair [ ] support' in the record." *Marshall*, 459 U.S. at 432, 103 S.Ct. 843, 74 L.Ed.2d 646. This court is satisfied that the Alabama Court of Criminal Appeals' findings were fairly supported by the record.

During petitioner's Rule 20 hearing, a number of questions were asked of both Mr. Propst and Mr. DiGiulian, petitioner's two trial counsel, regarding their understanding of the elements required for accomplice liability in a capital case. Unfortunately, both the questions and the answers were somewhat ambiguous. For this reason, the evidence of Mr. Propst's understanding of the law was at best ambivalent. *See, e.g.*, R20 at 599-608. However, the record contains sufficient evidence that DiGiulian did know of the intent and participation requirements to support the finding of the Court of Criminal Appeals on this point. At the Rule 20 hearing, DiGiulian testified:

> [Mr. Schafer:] ... Isn't it a fact that the reason you didn't argue lack of proof of intent was because you didn't really think it was legally relevant, that if there was a felony and a killing occurs during the course of the felony, that that was enough to convict?
>
> [Mr. DiGiulian:] Well, I don't know that that is exactly correct, but I'd say that's pretty close to it. I think if there is a killing out there and the evidence is such that it wasn't accidental, that it was an intentional shooting, that the jury can infer an act of intent from that.

* * * * * *

[Mr. Schafer:] On page 83 and 84, am I not correct in understanding that you were basically agreeing when I say that your understanding is that if a killing occurred during the course of a felony, then there was going to be a conviction?

A I think what I answered--and it's in here--is that if there was an intentional shooting and the jury believed that Keith was there and was a participant in the acts that led to the killing and involved in the killing, then yes, they would conclude that he intended that, I think is what I testified to.

* * * * * *

Q It was your understanding as recorded on 83, 84 that, quote, if he, petitioner, was a participant in the events, even though he was not the trigger man, that he could be convicted of capital murder under those circumstances and could be sentenced to death, end quote.

A That was my understanding.

R20 at 702-05 (emphasis added).

On cross-examination by counsel for the respondent, DiGiulian testified further on this point:

*1337 [Mr. Gibbs:] ... You're not of the opinion, are you, sir, that the defendant's mere presence at the scene without some showing of his participation in the actual murder in

> some way would, in and of itself, be sufficient to convict him of capital murder as opposed to some lesser included offense that he could be convicted of?
>
> [Mr. DiGiulian:] It's my understanding, right or wrong, that there would have to be some evidence of some participation.

R20 at 744-45 (emphasis added); *see also* R20 at 713, 752. *But see* R20 at 697, 699-700. This understanding was apparently carried into action at trial, as petitioner's counsel asked for and obtained a jury instruction emphasizing the State's burden to prove beyond a reasonable doubt that Johnson was guilty of an intentional killing before he could be convicted of the capital offense. Tr. at 1252-1253.

The court of Criminal Appeals' broader finding that counsel's choice of trial tactics was a thoughtful and strategic one is likewise supported by record evidence. Both Propst and Digiulian testified during the Rule 20 proceedings that they were satisfied that the jury could and would convict if the State could prove that Johnson was present at what was clearly an intentional killing, see, e.g., R20 at 753-54, and that they felt that the argument of alternative theories to the jury would be ill-advised. See, e.g., R20 at 615- 616. Thus the court concludes that it must accept the Court of Criminal Appeals' factual findings as correct, so far as they go. [FN27] The court therefore presumes that at least one of plaintiff's counsel understood the requirements of accomplice capital murder, and that together the two developed a strategy based on this legal background, their understanding of the facts of the case, and their judgment regarding a jury's probable response to these facts. They understood far more than petitioner now gives them credit for.

FN27. The court notes that its own evidentiary hearing touched on some of the same issues. Though plagued by a failure of memory on the part of both Messrs. Propst and DiGiulian, it elicited much the same somewhat ambiguous responses. See Transcript of March 20, 1996 Evidentiary Hearing ("TEH2") at 32-33, 35, 66-69.

However, counsel did not understand all that petitioner claims they should have, either. It appears that counsel did not recognize the import of the portions of Mrs. Cantrell's testimony which petitioner relies on, nor did they consider the possibility that this testimony could have been used to undermine the State's proof on intent. Counsel also did not evaluate possible avenues of attack on the intent issue which would not require alternative arguments to the jury; e.g., requests for additional jury instructions. It is unclear whether the Court of Criminal Appeals meant to sweep these matters within its broader findings. However, even if it meant to do so, the Court of Criminal Appeals could not have properly found that petitioner's counsel evaluated possible strategies regarding intent in settling on their approach at trial. What testimony there was regarding this issue during the Rule 20 hearing indicated that they did not. See, e.g., R20 at 610-11, 616, 625-26, 690-91, 699, 729, 757-58. This court's evidentiary hearings made it fairly clear that counsel simply did not think much about the intent issue at all. See, e.g., TEH2 at 33, 35, 41, 69, 85; Transcript of February 29, 1996 Evidentiary Hearing ("TEH1") at 51. Thus this court is left to determine whether they should have, and if so, whether any consequences of constitutional significance flowed from their failure to do so.

iii. *United States v. Cronic.*

The petitioner first claims that the performance of his attorneys in this regard was per se deficient under the test set out in *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). In *Cronic* the Supreme Court held:

> The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial *1338 testing. When a true adversarial criminal trial has been conducted--even if defense counsel may have made demonstrable errors--the kind of testing envisioned by the Sixth Amendment has occurred.

Id. at 656, 104 S.Ct. 2039 (footnotes omitted). The Court indicated that counsel could be presumed ineffective without a showing of prejudice (1) where there was "the complete denial of counsel;" (2) where "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing;" and (3) "when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct at trial." *Id.* at 659-60, 104 S.Ct. 2039. *See Vines v. United States*, 28 F.3d 1123, 1127 (11th Cir.1994).

This claim rests on the second of these grounds. In other words, Johnson claims that his attorneys did not subject the State's case to meaningful adversarial testing at trial. *United States v. Cronic*, 466 U.S. at 659, 104 S.Ct. 2039. According to the petitioner, his trial attorneys never subjected the State's argument and evidence on intent to adversarial scrutiny nor did they formulate any strategy concerning that element of the offense.

The State contends that Cronic is applicable in only two kinds of cases: where the defendant is completely denied the right to counsel and where external circumstances exist which would render any lawyer incapable of providing the defendant with the effective assistance of counsel. The court recognizes that " 'Cronic represents a narrow exception which the Supreme Court has carved out of the general rule that a petitioner claiming ineffective assistance of counsel must demonstrate that he was prejudiced by specific alleged errors in his counsel's performance,' " *Stone v. Dugger*, 837 F.2d 1477, 1479 (11th Cir.1988) (per curiam) (quoting *Smith v. Wainwright*, 777 F.2d 609, 620 (11th Cir.1985) (emphasis in original), *cert. denied*, 477 U.S. 905, 106 S.Ct. 3275, 91 L.Ed.2d 565 (1986)), cert. denied, 489 U.S. 1071, 109 S.Ct. 1354, 103 L.Ed.2d 821 (1989). However, the court does not believe the exception is quite so narrow as the State would make it. By its own terms, the *Cronic* rule is applicable where the conduct of the defendant's trial counsel resulted in a complete breakdown in the adversarial process. *See Cronic*, 466 U.S. at 659, 104 S.Ct. 2039 (citing *Davis v. Alaska*, 415 U.S. 308, 318, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974)). *See also Harding v. Davis*, 878 F.2d 1341, 1345 (11th Cir.1989) (illustrating such a situation); *Stone*, 837 F.2d at 1479; *Chadwick v. Green*, 740 F.2d 897, 900 (11th Cir.1984).

In evaluating the reach of this exception, it appears that the crucial inquiry is whether counsel's conduct is such that it can be recognized as completely inappropriate in any case, so bad that the defendant's counsel wasn't really acting as a lawyer at all. Thus Cronic properly applies only in cases in which a lawyer fails to carry out his most basic duties as an advocate, resulting in "ineffectiveness ... so egregious that the defendant was in effect denied any meaningful assistance at all." [FN28] *Chadwick*, 740 F.2d at 901. In *Cronic* the Supreme Court itself provided an illustration of this situation and fleshed out what it meant by failure to subject the State's

case to "meaningful adversarial testing." The Supreme Court cited as examples a series of cases which culminated *1339 in the decision in *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974), and involved a defendant's constitutional right to cross-examine the witnesses against him. In *Brookhart v. Janis*, 384 U.S. 1, 86 S.Ct. 1245, 16 L.Ed.2d 314 (1966), the case most analogous to the petitioner's, the Supreme Court condemned as a violation of the defendant's right to the effective assistance of counsel a decision by counsel to waive, over the defendant's personal objections, cross- examination of a government witness. *Id.* at 7-8, 86 S.Ct. 1245, 16 L.Ed.2d 314. Read in the light of Cronic, counsel's failure to cross-examine was an error so fundamental as to strip the trial of key constitutional safeguards and so prevent the attorney from subjecting the State's case to "meaningful adversarial testing." *Cronic*, 466 U.S. at 659, 104 S.Ct. 2039.

FN28. The First Circuit Court of Appeals, in *Scarpa v. DuBois*, 38 F.3d 1, 12-13 (1st Cir.1994), elaborated further on this aspect of Cronic: "In our view, the Court's language in Cronic was driven by the recognition that certain types of conduct are in general so antithetic to effective assistance--for example, lawyers who leave the courtroom for long stretches of time during trial are unlikely to be stellar advocates in any matter--that a case-by-case analysis simply is not worth the cost of protracted litigation. No matter what the facts of a given case may be, this sort of conduct will almost always result in prejudice." *See Cronic*, 466 U.S. at 658-59, 104 S.Ct. 2039.

However, the Court in Cronic carefully distinguished attorney errors trenching directly on constitutional rights "of the first magnitude" from less egregious mistakes. *Id.* at 659

& n. 26, 104 S.Ct. 2039. Errors particular to the facts of an individual case are qualitatively different from those involving a complete failure to advocate for the client. Less obvious errors cannot be disentangled from the specific circumstances of the case, and so must be considered in light of those circumstances. *See Strickland*, 466 U.S. at 693, 104 S.Ct. 2052 (*Strickland*-type "[a]ttorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial."); *see also Cronic*, 466 U.S. at 659 n. 26, 104 S.Ct. 2039. Virtually by definition, these errors "cannot be classified according to likelihood of causing prejudice" or "defined with sufficient precision to inform defense attorneys correctly just what conduct to avoid." *Strickland*, 466 U.S. at 693, 104 S.Ct. 2052. Consequently, the Court has declined to accord presumptively prejudicial status to them. *See id.*

Petitioner's most significant contention in this case is that his counsel failed to seize upon available factual and legal arguments to negate one of the elements of the crime he was charged with. These are serious allegations, and implicate the important responsibilities of attorneys to understand the facts and law involved in their cases. However, as the discussion below reveals, the errors petitioner alleges are intimately tied to the specific facts of his case. Neither the magnitude of counsel's alleged errors nor their ultimate effect can be analyzed without detailed reference to the record. More importantly, perhaps, petitioner was not left effectively unrepresented. His counsel did challenge the government's case, if not in the most effective manner possible. At bottom, petitioner simply claims that, given the facts of the case, counsel should have handled things differently. The court concludes that this is not the sort of situation in which an attorney's conduct can be assessed generically and condemned as an utter failure of representation. A case specific inquiry is required, and

Cronic therefore does not apply. See Chadwick, 740 F.2d at 901 (failure of counsel "to investigate and pursue all avenues of defense" is more appropriately analyzed under Strickland "rather than as a fundamental breakdown of the adversarial process such that prejudice is presumed under Cronic.").

iv. *Strickland v. Washington.*

In *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the Supreme Court established the standard by which most claims of ineffective assistance of counsel are to be evaluated:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient *1340 performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Id. at 687, 104 S.Ct. 2052. For a petitioner to establish the first prong of a *Strickland* claim, that his counsel was deficient, he must show that his counsel's representation "fell

below an objective standard of reasonableness." *Id.* at 688, 104 S.Ct. 2052. "[S]crutiny of counsel's performance must be highly deferential." *Id.* at 689, 104 S.Ct. 2052. The reasonableness of counsel's decisions should not be viewed with the benefit of hindsight. Instead, the court must "reconstruct the circumstances of counsel's challenged conduct, and ... evaluate the conduct from counsel's perspective at the time." *Id.*

> Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.

Id. at 690, 104 S.Ct. 2052 (emphasis added).

Because much effort has been expended in this case in arguing about why petitioner's counsel did what they did,

some further words are in order on this subject. An attorney's course of action during a trial may be fixed by many factors, including raw instinct, legal judgment and experience, legal knowledge or the lack of it, factual understandings and misunderstandings, and simple oversights. Flashes of genius and unfortunate mistakes are both part of real life in the courtroom for even the best trial attorneys. As the Eleventh Circuit has put it, "[t]here may be some attorneys who have tried difficult cases without ever making a mistake, but we doubt it." *Waters v. Thomas*, 46 F.3d 1506, 1520 (11th Cir.1995) (en banc). The law recognizes this reality, and therefore does not insist upon perfection. *See id.* at 1518 ("the test for ineffectiveness is not whether counsel could have done more; perfection is not required."); *Atkins v. Singletary*, 965 F.2d 952, 960 (11th Cir.1992) ("Trial counsel did enough. A lawyer can almost always do something more in every case. But the Constitution requires a good deal less than maximum performance."); *see also Harich v. Dugger*, 844 F.2d 1464 (11th Cir.1988) (en banc) (finding an attorney's representation effective despite an alleged misunderstanding of the law). Attorney mistakes can and must be tolerated, so long as the attorney's overall conduct falls within the "wide range" of reasonable professional assistance.

"The test has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial.... We are not interested in grading lawyers' performances; we are interested in whether the adversarial process at trial, in fact, worked adequately."

Waters, 46 F.3d at 1512 (quoting *White v. Singletary*, 972 F.2d 1218, 1220-21 (11th Cir.1992)).

However, this does not mean that the subjective reason for a particular action by counsel is entirely irrelevant. Under *Strickland*'s scheme, an attorney's legal and factual analysis is significant in at least one respect. The deference a court must give to an attorney's decisions depends to some extent upon whether those decisions were based on a careful and informed assessment of the available options. The Supreme Court has instructed that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Strickland*, 466 U.S. at 690-91, 104 S.Ct. 2052. This is because trial counsel, who is in the field and has access to subjective information unavailable to a distant reviewing court, is often in a better position to make a judgment call than the court itself. *See, e.g., Stanley v. Zant*, 697 F.2d 955, 970 (11th Cir.1983) (Vance, J.), *cert. denied*, 467 U.S. 1219, 104 S.Ct. 2667, 81 L.Ed.2d 372 (1984). Experienced counsel's judgment under these circumstances thus provides its own guarantee of reasonableness, a guarantee which the court should not lightly ignore. However, mistakes which do not flow from counsel's informed judgment are subject to a somewhat more searching inquiry, as they provide no such guarantee.

Nonetheless, even in these circumstances the burden to prove ineffective assistance is always a heavy one, as the successful claimant must ultimately bear the burden of proving that "the approach taken by defense counsel would not have been used by professionally competent counsel." *Harich*, 844 F.2d at 1470. The Eleventh Circuit Court of Appeals has emphasized the deference which is owed any time a court undertakes to second- guess an attorney regarding the difficult task of defending a criminal trial:

A jury trial is, by its nature, an enterprise that is filled with imponderables from the viewpoint of a trial lawyer. It is an undertaking that calls not only on the lawyer's head, but also on his heart and nerve. At times in the trial arena,

audacity or imagination or patience accomplish more than pure logic might suggest is possible. The truth is that it is often hard for even a good lawyer to know what to do. Trying cases is no exact science. And, as a result, we must never delude ourselves that the fair review of a trial lawyer's judgment and performance is an activity that allows for great precision or for a categorical approach. When reviewing whether an attorney is ineffective, courts "should always presume strongly that counsel's performance was reasonable and adequate." *Atkins v. Singletary*, 965 F.2d 952, 958 (11th Cir.1992). And, "a court should be highly deferential to those choices ... that are *arguably dictated by a reasonable trial strategy." Devier* v. Zant, 3 F.3d 1445, 1450 (11th Cir.1993).

Rogers v. Zant, 13 F.3d 384, 386 (11th Cir.1994). The court must always be on guard as "the distorting effects of hindsight," *Strickland*, 466 U.S. at 688, 104 S.Ct. 2052, make it all too easy to criticize an attorney's performance simply because his trial strategy was not ultimately successful. It is for this reason that the Supreme Court has set the bar for ineffective assistance claims so high. *See, e.g., Waters*, 46 F.3d at 1511-12.

Even once this hurdle is crossed, however, the petitioner must still establish that he was prejudiced by reason of that deficiency in order to make out a Strickland claim. To demonstrate prejudice, the petitioner must "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. Thus, the petitioner must demonstrate more than that the unreasonable actions of counsel "had some conceivable effect on the outcome of the proceeding." *Id.* at 693, 104 S.Ct. 2052. The petitioner is not required, however, to "show that counsel's deficient *1342 conduct more likely than not altered the outcome in the case." Id.

The Supreme Court has stated that *Strickland*'s prejudice test requires more than a showing that the trial outcome might have been different had trial counsel not been deficient. The *Strickland* standard was designed to guarantee not a crafty lawyer but a fair and accurate trial.

> [A]n analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective. To set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him.

Lockhart v. Fretwell, 506 U.S. 364, 369-70, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993). Thus, in order to prevail the petitioner must demonstrate that the outcome of his trial was either unreliable or fundamentally unfair.

a. Petitioner's Allegations.

As already noted, Johnson asserts that his attorneys were unaware that under applicable federal and state law, the prosecution was required to prove that he intended the death of Mr. Cantrell in order to convict on capital murder, and failed to recognize factual arguments which could have been made to undercut this critical element of the State's case. Johnson claims that counsel's lack of understanding was the cause of a number of particular errors, each of which was unreasonable and each of which was, individually or in concert with other errors, prejudicial to his defense.

b. Ineffective Trial Strategy.

Petitioner's most sweeping allegation is that counsel improperly selected the completely ineffective defense that Johnson was not present at the scene--a defense allegedly so bad that it was "no defense at all"--rather than choosing the more promising alternative of a "third man"/lack of intent defense. Petitioner's Memorandum at 41. According to Johnson, the State had ample evidence proving that he was present at the scene, but little or no evidence indicating that he had acted with an intent to kill. Testimony offered by Mrs. Cantrell could have been exploited to suggest that the petitioner was just entering the house when the victim fired his last shot. Thus petitioner claims that, whether true or not, an argument supportable by the facts could have been presented that he was not one of the two men involved in the shooting, but that he stayed outside the house in the carport until after the gunfight appeared to have ended. This theory would have been far superior to the argument actually advanced--that the petitioner was not present at all--because glass fragments and a bullet from the victim's gun strongly indicated that the petitioner was present at the crime scene. [FN29] Petitioner asserts that nothing other than trial counsel's ignorance can explain their tactical decision to choose this theory and ignore the "third man" defense.

FN29. The petitioner also apparently argues that trial counsel should have attempted to show that none of the bullets found in the victim's body were traceable to the petitioner's weapon and, therefore, even if he were present, he lacked the required intent to kill the victim because he either did not fire or missed so consistently at short range as to validate an inference that he fired with no intent of harming the victim. This subsidiary claim will be addressed, infra.

It is, frankly, unclear whether petitioner means to challenge counsel's strategic choices before trial, or is attacking only choices made during the trial. The court will therefore address both. In doing so, the court will make "every effort ... to eliminate the distorting effects of hindsight," *Strickland*, 466 U.S. at 688, 104 S.Ct. 2052, and will therefore take some pains in setting the stage for counsel's challenged decisions before analyzing them.

*1343 (1) Pre-Trial Choice of Strategy.

The court finds counsel's pre-trial decision to pursue a theory that Johnson was not present entirely reasonable in light of the information available to counsel, and particularly in light of what their client told them regarding his involvement in the crime. [FN30] *See also Johnson*, 612 So.2d at 1296. In preparing Johnson's case for trial, counsel spoke with several witnesses, and had repeated conversations with the petitioner himself. They also participated in a preliminary hearing at which they were given the opportunity to cross-examine a number of the State's key witnesses. It is no exaggeration to say that none of the information counsel gathered in this fashion suggested even the possibility of a "third man" defense. Mrs. Cantrell's preliminary hearing testimony was not infected by the problems which petitioner points to in her trial testimony. Indeed, at the hearing Mrs. Cantrell did not say much about the actual course of the gunfight and its aftermath, maintaining that after the first shots were fired she "couldn't tell nothing. It sounded like a bunch of fireworks." Transcript of Preliminary Hearing Held April 19, 1984 ("PHT") at 54; see id. at 53, 70. On the other hand, she certainly did not seem to be of the opinion that a third man had entered the house, and indicated that the two intruders she described were all that were present "to [her] knowledge." PHT at 78.

FN30. Subsequent to the submission of briefs, this court determined that the Rule 20 court, on whose findings the Alabama Court of Criminal Appeals relied in coming to its factual and certain legal conclusions, had, on the basis of the attorney-client privilege, prevented Johnson's trial counsel from testifying as to what the petitioner had told them that had influenced their strategic decisions. Earlier decisions of the Eleventh and Fifth Circuit Courts of Appeals, however, have concluded that a petitioner waives the attorney-client privilege if he or she attempts to introduce the testimony of his attorneys in an effort to demonstrate ineffectiveness of such attorneys at trial. *See Crutchfield v. Wainwright*, 803 F.2d 1103 (11th Cir.1986) (en banc) (Tjoflat, J., concurring) and *Laughner v. United States*, 373 F.2d 326, 328 (5th Cir.1967). Based upon that determination, the court ordered an evidentiary hearing on the "narrow factual issue" of "what petitioner told counsel about the crime and his role in it in order to assess whether their strategic and tactical choices were reasonable in light of the information known to them." Order of January 16, 1996, at 3. At the evidentiary hearing, the petitioner's counsel testified concerning their decision not to argue that petitioner was not present at the time of the offense.

The other evidence available to counsel bore out Mrs. Cantrell's version of events. Counsel's notes and their testimony before this court establish that the petitioner told his lawyers a story very similar to Mrs. Cantrell's, a story which included the information that it was he who was the second intruder in the house and that he fired several shots at the victim. *See, e.g.*, TEH2 at 22-24, 29-30, 57-60, 74-75, 79. As already discussed above, the physical evidence appeared consistent with this story as well. See supra at pp. 1332- 34. Thus counsel had no reason to suspect that further developments might uncover "third man" scenario,

particularly in light of what their own client had told them. *See Strickland*, 466 U.S. at 691, 104 S.Ct. 2052 (emphasizing that an attorney's decisions can quite properly be heavily influenced by what he learns from his client). Without a third man argument, no plausible challenge could be made to the State's proof of intent, as the second man participated in a shoot-out and so clearly displayed an intent to help his comrade kill Mr. Cantrell.

Under these circumstances, counsel's argument that Johnson was not present was a reasonable tactical approach to the case, and indeed was the only realistic approach available. In this regard, the court notes that the evidence that the petitioner was present was persuasive, but not overwhelming. First, counsel knew that no eyewitness could identify the petitioner as being present at the crime scene. The State's evidence was therefore entirely circumstantial. Second, the .357 magnum handgun that was found with the petitioner at the hotel in Oxford, Alabama, was not clearly matched to any of the bullets at the *1344 crime scene. Third, the bullet found in petitioner's back could not itself be definitely traced to Mr. Cantrell's gun. Next, a hair found in a brown cap allegedly worn by the petitioner during the robbery and murder did not match the hair of the petitioner. Boots allegedly worn by the petitioner during the shooting did not contain glass fragments from a shattered glass door pane. Finally, the strongest evidence linking the petitioner to the crime scene, glass found in the nose of the bullet removed from the petitioner's back which shared the same refractive index as one of the shattered door panes at the Cantrell house, was not revealed to counsel until the eve of trial. TEH2 at 37-41. Thus, particularly at the time they settled on their strategy initially, counsel had some material to work with in arguing that a sufficient link could not be forged between Johnson and the crime. Their choice to make this argument was therefore a reasonable one.

Because trial counsel chose a reasonable strategy in arguing that petitioner was not present at Mr. Cantrell's house, the court need not consider whether Johnson's case was adversely impacted by that defense. The court must, however, inquire whether the decision not to argue a "third man"/intent defense when the opportunity presented itself at trial was a reasonable one, and whether the petitioner was prejudiced by the failure to argue that defense.

(2) Failure to Argue Intent During Trial.

The petitioner claims that Mrs. Cantrell's testimony created an opening to challenge the State's evidence on intent, and that it was unreasonable for his counsel not to exploit this opportunity. Essentially, petitioner alleges that his counsel should have shifted on the fly from the strategy they had developed prior to trial to one focusing on intent. The court is not persuaded that their failure to do so was professionally unreasonable, for at least two reasons. First, under the circumstances the court does not believe that every reasonable attorney would have noticed the glitch in Mrs. Cantrell's testimony. Second, there was very little counsel could have done to underscore such a flaw within the constraints of Johnson's ongoing trial; thus, the court concludes that even if counsel had recognized Mrs. Cantrell's error they might still have tried the case in much the same way.

In evaluating both of these aspects of counsel's performance, it is critical to remember the circumstances under which counsel was forced to act. As already noted, Mrs. Cantrell's pretrial testimony contained no hint of the revelations which petitioner now relies upon. Her hearing testimony was consistent with the physical evidence and with Johnson's own story, and trial counsel had quite properly

developed a defense based on this understanding of events. By the time Mrs. Cantrell testified at trial, counsel had already unveiled this defense to the jury in opening argument and so, to a great extent, were stuck with it. See TEH1 at 24-25. Counsel's perspective on the trial would, quite naturally, have been colored by this underlying strategy, and their minds largely focused on pursuing it.

Petitioner's claim is that counsel should nonetheless have picked up on nuances in Mrs. Cantrell's trial testimony which suggested an entirely different approach. By far the most significant part of this testimony was elicited by Johnson's counsel on cross-examination. It is brief enough to be repeated here. According to Mrs. Cantrell, after her husband's last shot,

A. It didn't take [the intruders] long ... to start moving over further towards the door.
Q: Further towards the door?
A. That is right.
Q. So neither one of them was at the door when your husband fired the last shot?
A. No, they wasn't.
Q: They were not?
A. No.

Tr. at 386. The import of this testimony is far from obvious. It could have lasted no *1345 more than a minute before passing across counsel's radar screen and disappearing forever. Yet, the petitioner insists that in that brief span his counsel should have recognized the conflict between this testimony and what they knew of the State's physical evidence, linked this information to a legal theory they had long ago rejected, and evolved a strategy entirely different from the one they had prepared to pursue. The court acknowledges that some lawyers might be capable of such a feat, at least on an especially good day. Others might be left

with a nagging feeling that something about the testimony was strange. [FN31] But even the best lawyers (including, the court suspects, petitioner's current counsel) [FN32] have missed such subtleties entirely in the heat of battle. The court cannot say that, under the circumstances, every reasonably competent attorney would have realized the significance of Mrs. Cantrell's testimony. Thus petitioner's counsel were not constitutionally inadequate merely because they did not.

FN31. Every trial attorney is familiar with such nagging doubts, which may or may not blossom into realization later, hopefully in time to do something about it, if indeed there is anything to be done.

FN32. The court notes that current counsel's task in this regard was much easier than the one they set for trial counsel. A slow and considered perusal of a paper record in the comfort of one's own office, likely aided by the efforts of several young law associates, is an entirely different, and vastly less demanding, task than thinking on one's feet in the heat of trial. It is not therefore surprising that petitioner's current counsel eventually noticed this flaw in the record, while trial counsel did not.

This conclusion is buttressed by the court's opinion that, regardless of their subjective state of mind, counsel's outward actions were objectively reasonable. [FN33] Petitioner's current counsel have not been very precise in describing what they think trial counsel could and should actually have done with a "third man" argument, if they had noticed the opportunity to make one. Counsel had already embarked on a "Johnson was not there" defense, and would have had to walk very softly indeed in injecting an entirely new theory into the case. As the Eleventh Circuit has

observed in similar circumstances, "[a]lthough inconsistent and alternative defenses may be raised, competent trial counsel know that reasonableness is absolutely mandatory if one hopes to achieve credibility with the jury." *Harich*, 844 F.2d at 1470.

FN33. Although Eleventh Circuit precedent is not entirely clear on this point, at least one en banc decision appears to suggest that this inquiry is relevant in assessing ineffective assistance claims. *See Harich*, 844 F.2d at 1470-71. The court will therefore assume it is, although the court's ultimate conclusions do not depend on this part of the discussion.

Even if they had been willing to risk their credibility in this manner, counsel would have had little evidence to work with in constructing an argument on intent. The petitioner's own testimony would not have been helpful, as counsel ethically could not have put their client on the witness stand and examine him on intent when they knew that he had shot at Mr. Cantrell. Had he testified falsely, his own attorneys would have had to cast him adrift to "tell his story," and would have been unable to rehabilitate him after what would surely have been a searing cross-examination. Further questioning of Mrs. Cantrell would not have helped either, as she had indicated clearly at the preliminary hearing that only two men were present.

The most counsel could have hoped to do would have been to point out during closing argument to the jury, and perhaps via argumentative questions aimed at Mrs. Cantrell and others, [FN34] the flaws in the State's case on intent. To sketch out the petitioner's relatively complicated factual theory in a manner which the jury would understand would have required fairly explicit and extensive argument. The

court doubts that subtle innuendo would have worked, further exacerbating the problem *1346 of arguing in the alternative. Under these circumstances many attorneys would, quite reasonably, have elected not to embark on the risky and difficult endeavor of raising this issue with the jury, and would have contented themselves with little if any comment on the inconsistencies in Mrs. Cantrell's testimony. Thus "a competent attorney completely informed on the ["third man"] defense ... could well have taken action identical to counsel in this case." *Harich*, 844 F.2d at 1471. The court therefore concludes that petitioner's counsel's conduct was not professionally unreasonable in this regard.

FN34. The court also notes that cross-examination of a murder victim's widow is always a delicate undertaking in any event.

For much the same reason, the court finds that no prejudice resulted from trial counsel's failures to pursue a defense based on lack of intent. Little evidence could have been marshaled in support of such a defense, and the evidence against Johnson was strong. After all, the jury had before it evidence that Johnson had admitted to firing at Mr. Cantrell, along with physical evidence consistent with this story. Even Mrs. Cantrell's trial testimony indicated, with the exception of a few inconsistencies, that two intruders were involved in the crime and that both participated in the murder of her husband. As the Alabama Court of Criminal Appeals put it, "her testimony clearly states that two men forced their way into her house and ... fired shots at her husband." Johnson, 612 So.2d at 1297. Petitioner has therefore failed to demonstrate a reasonable probability that even aggressive pursuit of a lack of intent defense would have changed the outcome of his case.

c. Failure to Argue Intent to the Judge.

Petitioner contends that, even if his attorneys could not have risked arguing an alternative theory of lack of intent to the jury, they should have made this argument to the judge. Based on Mrs. Cantrell's testimony and other evidence, counsel could have pursued the issue of intent via (1) a request for a lesser included charge on felony murder, (2) an objection to the jury charges on capital murder and complicity; or (3) argument on a motion for judgment of acquittal. None of these predominately legal avenues of attack would have involved the jury. Trial counsel have admitted that the tactical problems with alternative arguments are much less severe when the jury is not affected. *See, e.g.*, R20 at 616, 690. They offer no tactical reason for their failure to argue lack of intent to the judge, indicating instead that they simply did not think about doing so. Their decision on this score therefore cannot properly be regarded as a strategic one.

Nonetheless, the court is not persuaded that the latter two allegations of deficiency asserted by petitioner have any merit. The court finds that counsel acted reasonably in these respects. For the reasons set out above, the court finds no constitutional deficiency in counsel's underlying failure to notice the import of Mrs. Cantrell's testimony. There was therefore no error in failing to bring this testimony to the attention of the judge.

More importantly, such an act would have been futile. As the court has already pointed out, the amassed evidence was more than sufficient to convict the petitioner of capital murder as an accomplice. There was therefore absolutely no grounds on which to object to jury charges on that offense, [FN35] and no available arguments sufficient to warrant a

judgment of acquittal. [FN36] Therefore the court finds no *1347 prejudice in counsel's failure to make these meaningless gestures.

FN35. The instructions the trial court gave on this subject were entirely appropriate, and apparently followed the Alabama model instructions. *See, e.g., Smith v. State*, 745 So.2d 922, 1999 WL 339272 (Ala.Crim.App. May 28, 1999) (approving virtually identical instructions); *Sockwell v. State*, 675 So.2d 4 (Ala.Crim.App.1994), *aff'd*, 675 So. 2d 38 (Ala.1995) (same); *Russaw v. State*, 572 So. 2d 1288 (Ala.Crim.App.1990) (discussing Alabama's model instructions on accomplice capital murder).

FN36. Petitioner complains that his indictment indicated that he was the killer of Mr. Cantrell, and was not consistent with a conviction as an accomplice. Unfortunately for petitioner, however, Alabama long ago abolished the distinction between principals and accessories in its criminal law. It is the law of this State that one charged as a principal properly may be convicted as an accomplice and vice versa. There is no requirement that the State notify the defendant in the indictment or otherwise that it is proceeding on an aiding and abetting theory. *E.g., Hyter v. State*, 545 So.2d 194, 197 (Ala.Crim.App.1988); *Wallace v. State*, 530 So.2d 849, 855-856 (Ala.Crim.App.1987); *Lewis v. State*, 469 So.2d 1291, 1297 (Ala.Crim.App.1984), *aff'd sub nom. Ex parte Blake*, 469 So.2d 1301 (Ala.1985).

Counsel's failure to seek a felony murder instruction, however, poses a more difficult question. As a practical matter, any criminal defense attorney facing a capital robbery-murder trial should at least consider requesting such

an instruction. Lesser included offenses are a key part of a defense attorney's arsenal in a capital case, particularly where, as here, a general challenge to the evidence is the only viable defense. It was also clear from the beginning that the State would have a hard time proving that Johnson was the triggerman. No arcane "third man" scenario was required for counsel to see the possible significance of this fact. Yet they asked for lesser included offense instructions on robbery and intentional murder, but not felony murder. It is difficult to understand why they did not at least consider such an instruction, which would have fit their facts at least as well as the others if not better. In the court's view, this failure falls close to the line of constitutional minimum performance, if not below it.

However, the court must agree with the Alabama Court of Criminal Appeals that the petitioner was not prejudiced by this mistake. *See Johnson*, 612 So.2d at 1298. While a felony murder instruction must be given in a capital case if the evidence warrants it, *see Beck v. Alabama*, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980), the Supreme Court made it clear in *Schad v. Arizona*, 501 U.S. 624, 111 S.Ct. 2491, 115 L.Ed.2d 555 (1991) that an instruction need not be given if there is not sufficient evidence to support it. More importantly, an instruction is of no use if the jury is not given a legitimate reason to choose the lesser offense over the capital one. Thus, in order to disturb his conviction based on a claim of ineffectiveness, the petitioner must demonstrate a reasonable probability that, if his counsel had asked for a felony murder instruction, the judge would have given it and the jury would have convicted on the lesser offense instead of capital murder.

In analyzing this question, the court must begin from two key premises, both flowing from the Supreme Court's admonition to "presume ... that the judge or jury acted

according to law." *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. First, this means that the court must give due weight to the jury's existing verdict. It is important to remember that a jury has already found, beyond a reasonable doubt, that the petitioner had the required intent to justify a conviction on capital murder. The jury was given proper instructions on this point [FN37] and, as the court has already pointed out, its decision was supported by the evidence. *See also id.* The court cannot lightly brush aside the jury verdict.

FN37. *See Yu v. United States*, 1998 WL 160964, at *7 (S.D.N.Y.1998) (underscoring the importance of this fact).

Second, in answering the difficult hypothetical question of "what might have happened if" counsel had acted differently, the court cannot indulge in the temptation to guess at the predilections of particular decision makers. The court's job is not to predict the interplay of reason and emotion in the minds of a particular judge or jury, but instead to play out the logical and lawful consequences of a particular set of circumstances.

An assessment of the likelihood of a result more favorable to the defendant, must exclude the possibility of arbitrariness, whimsy, caprice, "nullification," and the like. A defendant has no entitlement to the luck of a lawless decisionmaker, *1348 even if a lawless decision cannot be reviewed. The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision. It should not depend on the idiosyncrasies of the particular decisionmaker....

Strickland, 466 U.S. at 695, 104 S.Ct. 2052 (emphasis added). In order to prevail, petitioner must prove more than

that a sympathetic jury might have shown mercy and in essence "nullified" his capital conviction for reasons other than lack of evidence. He must show that the jury could properly have found him guilty of felony murder but not capital murder. [FN38] *See also Johnson*, 612 So.2d at 1298.

FN38. The court notes that, in this regard, *Strickland*'s requirements appear to be in tension with the pragmatic, psychological approach underlying the Supreme Court's decisions in *Beck* and *Schad*. As the discussion below reveals, strict application of Strickland's objective approach makes it very difficult if not impossible to prevail on a claim premised solely on the failure to ask for a lesser included instruction. Thus a few courts, without discussing Strickland's admonitions, have appeared to apply a more flexible and pragmatic approach in predicting a jury's response to a lesser included charge. *See O'Rourke v. Endell*, 153 F.3d 560, 571-74 (8th Cir.1998); *Kilgore v.* Bowersox, 124 F.3d 985, 995 (8th Cir.1997); United States v. Jackson, 726 F.2d 1466, 1470 (9th Cir.1984). However, in this court's view Strickland's mandate is clear and binding. The court must therefore leave the fine adjustment of the law in this area to a higher authority, and do its best to apply what the Supreme Court has written.

The problem with petitioner's argument, of course, is that the jury has already found him guilty of capital murder. Presuming, as it must for these purposes, that the jury applied the law on accomplice liability and reasonable doubt properly, the court sees no logical basis to conclude that an additional alternative charge would have led the jury down a different path. Such a charge would change neither the evidence nor the standard for a conviction on capital murder, and so for an objective and rational jury should not change the result. Of course, as a practical matter the court

recognizes that the jury might have chosen felony murder simply to avoid the possibility of a penalty of death, though this seems unlikely given the jury's choice to pass over the other non- capital options presented. *See also Kilgore*, 124 F.3d at 995 (finding no prejudice from counsel's failure to request additional lesser included charges in similar circumstances). Paraphrasing the Supreme Court's observations in a similar circumstance, the court finds it difficult to believe "that a jury unconvinced that petitioner was guilty of ... capital ... murder, but loath to acquit him completely (because it was convinced he was guilty of [felony murder]), might choose capital murder rather than [intentional] murder as its means of keeping him off the streets.... [W]e can see no basis to assume such irrationality." [FN39] *Schad*, 501 U.S. at 647-48, 111 S.Ct. 2491. However, whether the court's assessment is accurate or not does not appear to matter, as *Strickland* forbids any inquiry into the possibility of such "lawless" and result-oriented modes of jury decision making. *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. Applying *Strickland*'s presumptions, the court must conclude that the addition of a new lesser included charge would not have changed a rational jury's decision.

FN39. The court notes, however, that felony murder fit the circumstances better than the other lesser included charges presented. This might make a difference in a pragmatic analysis of the attractiveness of that charge to a jury in comparison to the other alternatives presented, *see also Kilgore*, 124 F.3d at 995 (analysis different if alternative charges given "did not make sense"), but makes no difference to the objective analysis mandated by *Strickland*.

Nor can petitioner avoid this result by contending that if counsel had only asked for a felony murder instruction and

argued to the jury regarding the inconsistencies in Mrs. Cantrell's testimony, that the result might have been different. The court has already found that the latter argument was not constitutionally required, and that such an argument would not have been effective in any event. The jury heard all *1349 the evidence and, with or without a "third man" argument, would in all probability have reached the same conclusion. A rational jury would not change this conclusion merely because of the other alternatives provided. Neither the "third man" nor the felony murder charge claims of ineffectiveness are constitutionally sufficient. They do not become so merely because they have been packaged together.

Thus the court concludes that, even if counsels' failure to request a felony murder charge can properly be regarded as constitutionally deficient performance, no prejudice resulted. Petitioner therefore cannot prevail on this claim of ineffective assistance of counsel.

d. Defense Counsel's Argument to the Jury.

Johnson now argues that during his closing argument, one of his trial lawyers "affirmatively invited the jury to convict Petitioner of capital murder on evidence that he was merely present." According to present counsel, this argument "demonstrates conclusively and succinctly that counsel were totally ill-equipped to effectively represent Petitioner." In his closing argument, DiGiulian stated:

> You are going to have to go back there, and you are going to have to find, in order to convict and find Keith guilty, you are going to have to find that the State has proved an intentional killing occurred, a forcible robbery or intent to rob, and going to have to find that

> Keith was one of the men that was out there. That is what you are going to have to do in order to find each and every one of those beyond a reasonable doubt and to a moral certainty. Each one of you is going to have to do that.

Tr. at 819-20.

On this claim, the Alabama Court of Criminal Appeals found that "[c]ontrary to Johnson's assertions, DiGiulian did not affirmatively state to the jury it was not necessary for the state to prove that he [Johnson] had the intent to kill." *Johnson*, 612 So.2d at 1299.

It should first be noted that present counsel have isolated and focused upon a very small part--exactly three sentences--of DiGiulian's lengthy and detailed closing argument on behalf of his client. As with most matters, the argument must be considered as a whole and in the context of the entire trial, including the defense strategy and the trial court's instruction to the jury. Moreover, as the Eleventh Circuit has stated, closing argument represents "an inherently subjective task" and counsel is due special deference in the manner in which such arguments are made. *Thompson v. Wainwright*, 787 F.2d 1447, 1455 (11th Cir.1986), *cert. denied*, 481 U.S. 1042, 107 S.Ct. 1986, 95 L.Ed.2d 825 (1987).

Before closing arguments began, the trial judge reminded the jury that the arguments of the lawyers were not to be taken as the law applicable to the case. Tr. at 757. Following the closing arguments, the judge once again instructed the jury that it was his duty to decide and define the law. Tr. at 838. During his instructions, the judge

repeatedly and emphatically instructed the jury that a necessary element of the capital offense was that the defendant had committed an intentional killing or had intentionally aided and abetted an intentional killing, and that the jury could not convict the defendant unless it was convinced beyond a reasonable doubt of that necessary element. Tr. at 856, 858-859, 861-862, 864-865, 866.

Notwithstanding habeas counsel's insistence that Johnson's trial lawyers did not appreciate the essential requirement that their client could not be convicted unless the State proved that he intended the death of Mr. Cantrell or another, it is manifest that they did, in fact, understand just that. Before beginning their closing arguments, trial counsel submitted and requested the judge to give a three paragraph instruction that emphasized the State's burden to prove beyond a reasonable doubt that Johnson was guilty of an intentional killing before he could be convicted of the capital offense. Tr. at 1252- *1350 53. The court gave the instruction as requested. Tr. at 864-65.

It was in this context that final arguments from both the prosecution and the defense focused on the petitioner's involvement in the crime. References to finding Johnson guilty if he were present were far from concessions that the capital charge could be proven on a felony murder theory. Instead, they constituted nothing more than a recognition of the state of the evidence. If the jury believed that Johnson was the "second man" who fired shots at Mr. Cantrell, he was guilty of capital murder. With the evidence in this case, Johnson could avoid a conviction for capital murder only if the jury entertained a reasonable doubt about whether he was that "second man." Intent to kill was not a real issue in the case because that "second man," whoever he was, was a willing, armed participant in the robbery who fired shots at the decedent.

The comment in question was consistent with the defense trial strategy [FN40] --Anthony Keith Johnson was not one of the men who went into the Cantrell home and robbed and murdered Mr. Cantrell. When viewed in its proper context, no reasonable argument can be made that DiGiulian invited the jury to convict on less than proper proof. Moreover, there is nothing to suggest that the jury disregarded the court's clear and unequivocal instructions on the elements necessary to convict the petitioner of capital murder.

FN40. As discussed above, trial counsel's selection and pursuit of this strategy represented constitutionally adequate performance.

That being the case, the performance of trial counsel was not constitutionally deficient and petitioner has not shown a reasonable probability that in the absence of the challenged statement the outcome of the trial would have been different.

e. Failure to Object to the Prosecutions' Improper Closing Argument.

The petitioner charges that his trial attorneys were constitutionally ineffective because of their failure to object to certain comments made by the prosecutor in closing arguments. In his argument, the prosecutor stated:

> His honor will charge you in this case, ladies and gentlemen, concerning complicity. He will charge you in this case that if these two men went in there, and if they went in there to rob this dear lady and her husband, the act of

> one is the act of both, the act of one is the act of all, and what one does the other one is responsible for. You listen to his charge. When those two men busted through that door out there that night, everything that each one of them did the other one was responsible for under the law of the State of Alabama, and one is just as equally guilty for the death of this man as the other.

Tr. at 827-28. According to habeas counsel, the prosecutor "invited the jury to convict on evidence sufficient to support only a felony murder charge" and his statement was "both wrong on the law and wrong on the facts."

On this claim, the Alabama Court of Criminal Appeals noted that the trial judge gave an instruction to the jury that "closing arguments, like opening statements, do not constitute the law" and that it was "the court's duty to decide and define the law for the jury." *Johnson*, 612 So.2d at 1300. The trial judge's instruction, the Court of Criminal Appeals found, was adequate to correct any harm arising from the State's claimed misstep. In addition, the Court of Criminal Appeals found that because the misstatement, if it was a misstatement, was on an aspect of the case "not material to the theory of defense," it could not have affected the jury's consideration of the issues before them.

Controlling decisional law of this circuit generally sanctions the approach taken by the Court of Criminal Appeals. In *Shriner v. Wainwright*, 715 F.2d 1452, 1459 (11th Cir.1983), the prosecutor referenced a crime for which the defendant was not charged, introducing to the jury a non-statutory sentencing factor for consideration in their determination of whether the death penalty was warranted.

The Eleventh Circuit refused to undo the sentence on this ground, stating "with a properly instructed jury, there is nothing to show the jury relied on the prosecutor's remarks." *Id.*; *see also United States v. Agurs*, 427 U.S. 97, 110, 96 S.Ct. 2392, 2400, 49 L.Ed.2d 342 (1976) (prosecutorial misconduct should be evaluated not on the basis of culpability but by its effect on the fairness of the trial).

This position has been regularly restated. In *United States v. Smith*, 918 F.2d 1551, 1561 (11th Cir.1990), the court held:

> Because statements and arguments of counsel are not evidence, improper statements can be rectified by the district court's instruction to the jury that only the evidence in the case be considered. *See United States v. Barshov*, 733 F.2d 842, 847 (11th Cir.1984), *cert. denied*, 469 U.S. 1158, 105 S.Ct. 904, 83 L.Ed.2d 919 (1985); *see also Springer v. Wal-Mart Assocs.' Group Health Plan*, 908 F.2d 897, 901 (11th Cir.1990) ("Counsel's closing argument, of course, is not competent evidence."). In this case, the district court properly instructed the jury that opening and closing statements by counsel were not evidence in the case.

See also United States v. Gainey, 111 F.3d 834, 837 (11th Cir. 1997) (same) and *United States v. Simon*, 964 F.2d 1082, 1087 (11th Cir. 1992) (same).

The trial judge here instructed the jury that the counsel's arguments were not to be taken as descriptions of the law and gave the jury the proper instructions on the offenses of which Johnson was charged. While an objection by counsel might have provoked from the trial judge a more

definitive statement in disavowing the prosecution's comments, the judge sufficiently shielded the jury from those comments. The court can find no basis for concluding that the fairness of the trial was adversely impacted or that its outcome might reasonably be expected to have been different had counsel objected to the prosecution's remarks.

f. Accumulated Attorney Error.

The petitioner finally contends that, even if the errors of his counsel did not individually work to prejudice his cause, when considered as a whole and in the context of the entire trial, the cumulative effect of these errors was to undermine confidence in the outcome of the trial. He argues that, whether under the rubric of *Strickland* or *Cronic*, counsel's egregious mistakes should be rectified. The court cannot agree.

The petitioner seemingly would apply a volume discount theory, bundling all of trial counsel's perceived errors, big and small, into one great mass with a Sixth Amendment denial of counsel label. However, this approach is sanctioned neither by *Cronic* nor *Strickland*, the two cases which set out the available avenues for relief on a claim that counsel was ineffective. As the court has already noted, counsel's alleged mistakes were not the sort of conduct that creates a presumption of harm under *Cronic*. A denial of the Sixth Amendment right to counsel as envisioned in *Cronic* occurs where "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing." *Cronic*, 104 S.Ct. at 2047. In such cases, the adversary process itself becomes presumptively unreliable and there is no requirement to show any specific prejudice. That is simply not what happened here.

Nor is *Strickland*'s rule adaptable to the generalized allegations leveled by petitioner. By its very nature, the *Strickland* analysis focuses on particular errors and the harm which flows from them. *Strickland* makes it clear that, to prove a claim of ineffective assistance of counsel, a habeas petitioner must identify a specific error and show prejudice flowing from that error. Nothing in *Strickland* suggests *1352 that a combination of several errors can be prejudicial when none, standing alone, would be sufficient to authorize relief. [FN41]

FN41. One might consider here the holding in *Footman v. Singletary*, 978 F.2d 1207 (11th Cir.1992). There, the Eleventh Circuit held that every single incident undergirding a claim of ineffective assistance of counsel must be exhausted, and that it is not enough simply to aver a broad claim of ineffectiveness in order to have exhausted claims of specific errors. If the prejudicial effect of alleged errors can be compounded, why require the exhaustion of specific counsel errors? If all are but a part of a single claim, then the averment of the single claim (without identifying the specific factual basis for each ground) should be sufficient to exhaust the claim. The court does not believe that the combination of several non-prejudicial errors can form the cornerstone upon which to erect a viable ineffectiveness of counsel claim.

Most importantly, as demonstrated *supra*, counsel's claimed errors did not deprive the petitioner of the effective assistance of counsel. The factual premise for most of the petitioner's ineffectiveness claims is simply wrong. It is clear that counsel did not fail to comprehend the differences between felony murder and capital murder. The evidence is, and the court finds, counsel chose the strategy they did because it was the best available to them. The issue at the trial was whether the petitioner was involved in the robbery

and murder of Mr. Cantrell at all. The evidence was such that counsel could hardly have argued, with credibility, that Johnson was involved in the robbery but not the murder. There was more than enough evidence to convince the jury that the petitioner fired shots at Mr. Cantrell, and that the petitioner must have intended to kill Mr. Cantrell.

It is important to note that trial counsel were operating in the real world of a criminal trial. If they were to do anything for their client, they had to convince the jury that the petitioner was not involved in the robbery and murder at all. They were not afforded the serenity of conducting a finely tuned academic examination of a record already made, and had no time to devise fine-spun legal arguments with the benefits of hindsight and time for ample thought and research. In short, trial counsel were forced to act in the heat of battle. They did as well as the petitioner was constitutionally entitled to expect.

The court does not contend that counsel, standing "eye ball to eye ball" with the opponent, never "blinked." Mistakes were clearly made. As is true of all lawyers in almost all cases, it would not have hurt for counsel to have been a little more thoughtful and a little more prepared. The petitioner's attorneys may not have done a great job, or even an especially good job. Likely, there are things they themselves wish they had done differently. But the bottom line is this: counsel did an adequate job. They correctly recognized that their client's only real chance was to put the State to its proof that he was involved at all, and they did so. Their challenge to the State's case provided the constitutional guarantee of accuracy that lies at the heart of the Sixth Amendment. "Trial counsel did enough." *Atkins v. Singletary*, 965 F.2d 952, 960 (11th Cir.1992). The Constitution requires no more.

v. Failure to Give a Felony Murder Instruction.

The petitioner asserts that he was entitled to an instruction on felony murder under *Beck v. Alabama*, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980). The court notes that the petitioner failed to raise *this claim at trial and, therefore, it is defaulted.* Johnson, 612 So.2d at 1292. Additionally, for the reasons given above, he cannot rely on his claim of ineffective assistance of counsel to excuse the default.

vi. The Actual Innocence Exception to Procedural Default.

Petitioner's last major assertion regarding the "third man" defense is that the theory proves that he was actually innocent of the crime of capital murder. Under established Supreme Court precedent, proof that a constitutional defect led *1353 to the conviction of an innocent man would excuse any procedural default in failing to point that defect out to the state courts. However, as petitioner has failed, even arguably, to prove that he is innocent of capital murder, this doctrine will not excuse any defaults in this case.

One way by which a habeas petitioner may avoid the consequences of his procedural default is by demonstrating that refusal by the federal court to hear the defaulted claim will result in a "fundamental miscarriage of justice." *Smith v. Murray*, 477 U.S. 527, 537-38, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986); *Murray v. Carrier*, 477 U.S. 478, 495-96, 106 S.Ct. 2639, 2644, 91 L.Ed.2d 397 (1986). A "fundamental miscarriage of justice" occurs "in an extraordinary case, where a constitutional violation has resulted in the conviction of someone who is actually innocent." Id. at 496, 106 S.Ct. 2639. The petitioner may be actually innocent either of the crime allegedly committed or of the penalty being exacted.

Sawyer v. Whitley, 505 U.S. 333, 339-40, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992).

On habeas review, in order to prove actual innocence, the petitioner must come forward with "new reliable evidence" proving his innocence which was "not presented at trial." *Schlup v. Delo*, 513 U.S. 298, 324, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995). Petitioner must then "show that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." *Id.* at 327, 115 S.Ct. 851. The petitioner must also demonstrate that, absent independent constitutional error, he or she would likely have been found innocent of the crime or of the penalty. *Id.* at 314-16, 115 S.Ct. 851.

As the discussion above makes clear, petitioner meets none of these requirements. Petitioner bases his claim on a new factual theory, not newly discovered evidence. He has not come forward with any new evidence in support of his petition. All of the relevant evidence was before the jury, including those portions of Mrs. Cantrell's testimony which the petitioner now relies on. The jury nonetheless found him guilty of capital murder and, as the court has pointed out, that decision was supported by the evidence. Nor can the petitioner avoid this conviction by leaning yet again on his "third man" argument. No constitutional error led to his conviction, as no error was made in failing to present a "third man" defense. Even had a "third man" argument been made, the court is satisfied that the jury properly could have and most likely would have convicted Johnson anyway. The evidence, including the evidence before the jury at trial and before this court now, demonstrates that Johnson is guilty of capital murder. He is far from innocent, and the "actual innocence" exception to procedural default simply does not apply.

C. Other Claims, of Ineffective Assistance of Counsel.

1. Other Claims of Trial Counsel Error.

Petitioner makes a number of claims of trial counsel ineffectiveness. Several have been discussed elsewhere, as they are intertwined with more general claims of error. However, two of petitioner's claims are unrelated to the remainder of petitioner's case, and require separate analysis. The court will examine each in turn.

i. Cross-examination of David Lindsey.

The petitioner claims that his trial counsel's cross-examination of prosecution witness David Lindsey was so inadequate that he was denied the Sixth Amendment right to effective assistance of counsel. In particular, Johnson claims that his counsel failed to identify for the jury certain claimed discrepancies between statements Lindsey had given to police--statements that trial counsel allegedly were not aware of but that they had in their possession--and testimony given by him at the preliminary hearing and at trial. These discrepancies include the following: (1) in his March 15, 1984, statement to police Lindsey referred *1354 to one of the people in the hotel room where Johnson was arrested as "a boy named Russell" but later identified the man as "Russell Lovell"; (2) in his March 15, 1984, statement Lindsey claimed that his mother-in-law told him that the petitioner had been shot, whereas in subsequent statements Lindsey claimed that he learned this fact from the petitioner, and (3) in his statements to police Lindsey recounted that Johnson had told him that he and "two brothers" had been involved in the robbery while at trial Lindsey stated that the petitioner had told him that he and "some friends" were involved in the robbery. The petitioner also claims that his

trial counsel failed to take advantage of contradictions between statements Lindsey made in the preliminary hearing and those he made at trial. Among these were: (1) testimony at the preliminary hearing that Johnson was looking for "money and gold" and his testimony at trial that he was only out to get some "gold"; (2) alleged differences as to whose question, Lindsey's or someone else's, prompted the petitioner to respond that he had shot at the victim; and (3) Lindsey's apparent uncertainty regarding the number of people that petitioner reported to have entered the victim's home with him. Johnson also complains that his attorneys did not adequately impeach Lindsey when they failed to take full advantage of an alleged affair between Johnson and Lindsey's wife; by not further inquiring into a criminal investigator's report that Lindsey was considered by some to be a "thief"; and that he was not well thought of when he left his employment as an oil rigger. Finally, petitioner claims that counsel inappropriately failed to call as witnesses the three people who had shared the hotel room with petitioner in order to rebut Lindsey's testimony that, at the hotel, Johnson stated he shot at the victim and believed that he had hit him.

This issue was before and considered by the Alabama Court of Criminal Appeals. That court stated:

> Defense counsel demanded a preliminary hearing for discovery purposes to cross-examine prosecution witnesses before trial. One of those witnesses was David Lindsey. Defense counsel reviewed that preliminary hearing transcript, including Lindsey's testimony, in detail before trial. They also interviewed the officer in charge of the investigation several times, and they talked a great deal with Johnson about the facts of the case. Their conduct of the defense was based upon what Johnson told them, and Johnson

> told them "the whole story." In addition to all those efforts, defense counsel employed an investigator to help them find any useful impeachment information about Lindsey. That investigator worked on the case for more than nine weeks.

Defense counsel effectively cross-examined David Lindsey. Defense counsel brought out a contradiction between Lindsey's trial testimony and the testimony that he had given at the preliminary hearing. Defense counsel suggested that Lindsey was biased against Johnson because Johnson and Lindsey's wife had had an affair. Trial counsel forced Lindsey to admit that he had been convicted of illegal possession of controlled substances, specifically methamphetamines, and that Lindsey shot the drug into his arms. As defense counsel argued to the jury, "Mr. Lindsey was a man who mainlined speed, shot it up his arm."

> While Johnson's present counsel makes it clear that he would have followed a different strategy in cross-examining Lindsey, that is not the test for ineffective assistance of counsel. "There are countless ways to prove effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Strickland v. Washington, supra*, 466 U.S. at 689, 104 S.Ct. at 2065.
>
> Moreover, Johnson has not even proven an evidentiary basis for his alternative strategy. Johnson has not shown that any additional information in the investigator's *1355 report would have been useful in impeachment, or even admissible. Johnson did not offer as witnesses at the evidentiary hearing any of the four men who were present at the motel and

> who he now hopes could have impeached Lindsey's testimony. Absent a showing that real impeachment evidence was available and could have been put forward at trial, Johnson has not shown that it would have made any difference at all to cross-examine Lindsey concerning those statements. Finally, the deposition of Lindsey by Johnson's present counsel does not establish that their latest cross- examination strategy would have been any more effective than the cross-examination of Lindsey that actually occurred.
>
> Therefore, Johnson has failed to show that trial counsel's cross-examination of Lindsey was outside "the wide range of reasonable professional assistance," or that there is a reasonable probability that if counsel had used a different cross-examination strategy, the trial would have ended differently. *Strickland v. Washington*, *supra*, 466 U.S. at 689, 104 S.Ct. at 2065.

Johnson, 612 So.2d at 1300-01.

The Eleventh Circuit has mandated a similar approach to claims of ineffectiveness on cross-examination. Decisional law makes it clear that where an attorney "substantially impeach[ed]" the witness, no claim for ineffectiveness can succeed unless the petitioner comes forward with "specific information" that "would have added to the impeachment of the State's witnesses." *Aldrich v. Wainwright*, 777 F.2d 630, 636-37 (11th Cir.1985); *see Card v. Dugger*, 911 F.2d 1494, 1506 (11th Cir.1990). Without such information, petitioner cannot bear his burden of proving prejudice. Moreover, claims that an attorney should have cross-examined on "inconsequential" matters establish

neither constitutionally deficient performance nor prejudice. *Mills v. Singletary*, 63 F.3d 999, 1021 n. 36 (11th Cir.1995). Application of these principles readily disposes of petitioner's claims.

a. Allegedly Contradictory Statements.

The court will assume, for the sake of argument, that petitioner's counsel were unaware of certain aspects of Lindsey's past statements, and that this lack of awareness represents constitutionally deficient performance. [FN42] Whether counsel's representation was deficient in this respect is of no moment because the petitioner was not harmed by their alleged failures. The so-called contradictions petitioner points to in Lindsey's testimony are for the most part irrelevant and inconsequential, if indeed they are inconsistencies at all. For example, the claimed conflict between Lindsey's reference to "money and gold" at the pretrial hearing and the reference to "gold" at the trial is either trivial or nonexistent. Likewise, the court finds little significance in Lindsey's confusion about who asked the petitioner how he had been injured. The critical portion of Lindsey's testimony was Johnson's response to the question, and that testimony remained substantially the same in every version of Lindsey's testimony. Finally, little can be made, in this context, of Lindsey's apparent uncertainty about the number of people petitioner reported as entering the Cantrell home on the night of the robbery *1356 and murder. The point of the testimony remained the same: Petitioner stated that he was present (with others) at the time and place of the crime, and had shot at the victim.

FN42. As a practical matter, the court doubts that petitioner can establish even this. As with every other aspect of counsel's performance, the law requires not perfect

preparation but reasonable preparation. Constitutionally effective counsel are not required to have a detailed knowledge of every factual matter concerning a witness, but only need to have a fair awareness of the matters relevant to the witness's testimony and credibility. The issue is not whether counsel attacked a prosecution witness on every conceivable point but whether they subjected his testimony to the adversarial testing that is integral to the trial process. The court believes that they did. *See Roberts v. Singletary*, 794 F.Supp. 1106, 1122 (S.D.Fla.1992) ("No constitutional error results from counsel's failure to exploit every potential inconsistency.").

It is not at all uncommon for witnesses to vary small details in their testimonies. This is a fact of real life, and does not necessarily indicate that the witness is lying. While demonstrating that a witness made mistakes on an unusually large number of small details might be a reasonable trial strategy, making too much of a few small errors often has little positive benefit except to display for the jury the lawyer's skill at splitting hairs. [FN43] On the other hand, counsel's actual cross cast a general shadow over Lindsey's character and veracity by bringing out his drug use and hinting at a motive for lying in the form of an affair between the petitioner and Johnson's wife. The court cannot imagine that a jury unpersuaded by this information would have rejected Lindsey's testimony based on inconsistencies in some rather minor details. *See Aldrich*, 777 F.2d at 637. Johnson's defense was not prejudicially impacted by the his attorneys' cross-examination of Lindsey.

FN43. This judge's experience as a member of a criminal trial jury a number of years ago and reports from other lawyers and judges who have also served as jurors, suggests that the sort of "nitpicking" demanded by present counsel is exactly

the sort of thing that convinces "real people" that trial lawyers often are intent on misleading the jury to achieve an unjust result. In other words, juries often don't respond well to this kind of approach.

b. Counsel's Efforts to Undermine Lindsey's Character.

The petitioner's complaint that his counsel were insufficiently energetic in their efforts to undermine Lindsey's character as a reliable witness is also flawed. First, Johnson has yet to explain what more trial counsel could have done to demonstrate that Johnson and Mrs. Lindsey had engaged in an illicit romantic relationship. Second, Johnson's counsel was not required to exhaust to their fullest every lead that might have undermined Lindsey's reliability. Counsel pursued information on Lindsey via an investigator, and chose and utilized the argument they found to weigh the most strongly against his character--that he took drugs while in the Army and was on pain medication when the relevant events occurred. These were substantial arguments, and counsel's choice was therefore reasonable.

Nor do counsel's actions undermine confidence in the conviction. Mr. Johnson has not demonstrated that, even if counsel had exhausted every lead and put on display before the jury every possible character flaw of Lindsey, there exists a reasonable probability that the outcome of the trial would be any different. The picture counsel actually painted on cross-examination was an ugly one, but the jury apparently believed Lindsey anyway. Johnson has simply failed to carry his burden of coming forward with "specific information" which counsel should have found and which would have altered the course of the trial. *See Aldrich*, 777 F.2d at 636.

c. Failure To Present Conflicting Witness Testimony.

At trial, Lindsey testified that the petitioner told him that "I got shot, but I got off a couple of rounds and I believe I got that son of a bitch." Apparently, three other friends of the petitioner's, Gene Loyd, Jay Roberson, and Russell Lovell, were present in the motel room when the statement was allegedly made. Trial counsel did not offer the testimony of any of these men to contradict Lindsey's statement. Habeas counsel now claim, with no discernable evidentiary support, that the testimony of the three men would have been beneficial to the defense because "not one of the potential witnesses corroborated Lindsey."

A state habeas petitioner who claims that his attorneys were ineffective at trial because they failed to call certain persons as witnesses must prove that the proposed witnesses would have testified *1357 favorably to his defense. *See Aldrich*, 777 F.2d at 636. Here, Johnson has offered no evidence that any of the three individuals who were present with him in the Oxford motel would have testified in a way that was inconsistent with the testimony given by Lindsey. Petitioner points only to unsworn statements taken from the three men by the police, which did not confirm Lindsey's testimony about Johnson's damning admissions. Unfortunately for the petitioner, none of these statements indicates that the petitioner did not admit to the crime either. They do not directly contradict Lindsey's testimony. See infra at pp. 1364-65; *see also Card*, 911 F.2d at 1506 (finding no ineffectiveness where "none of the evidence that petitioner claims could have been introduced directly contradicts or undermines the testimony of" the State's witness). Petitioner offers only speculation, based on these vague statements, that the missing witnesses would have been helpful. Such speculation is "insufficient to carry the burden of a habeas corpus petitioner." *Aldrich*, 777 F.2d at 636. In these circumstances, the petitioner cannot prove

that his defense was harmed by the failure to call any of these three men as impeachment witnesses. [FN44]

FN44. The court notes that, if the failure to contact petitioner's proposed witnesses was an error on the part of trial counsel, petitioner's current counsel are equally guilty. Indeed, they may have even less of an excuse for their failure than do Johnson's trial attorneys. "Although counsel may have been pressed for time in [June 1985], the intervening decade should have revealed whatever evidence it is contended should have been discovered prior to trial." *Aldrich*, 777 F.2d at 636.

ii. Ineffective Assistance Because of Claimed Improper Objection to Statistical Evidence.

In the nose of the bullet taken from Johnson's back, tiny shards of glass were discovered, indicating to investigators that the bullet had earlier penetrated a glass surface. In the Cantrell's home, a door opening into the room in which the shooting occurred was ornamented with glass panes, three of which were shattered in the gunfight that resulted in the death of Mr. Cantrell. At trial, the prosecution called a forensics expert to link the small fragments of glass to one of the broken door panes. With respect to two of the panes, there was no match. But the refractive properties of the third pane seemed to closely match those of the glass shards found on the bullet from Johnson's back. [FN45] At this point, the trial judge inquired into the reliability of the evidence showing a relationship between the refractive indexes:

FN45. The refractive index of glass is a measurement of the

angle at which light passing through the glass is bent.

> Court: Does your science provide you any judgment as to the mathematical probabilities of these two comparisons as to indicate them from being from the same source or not?
>
> The Witness: There has been some statistics that have been done and accumulated from the F.B.I. that I am familiar with.
>
> Court: What is the mathematical probability?

Tr. at 732-33. Trial counsel then objected on hearsay grounds. The judge overruled the objection, stating that, as an expert, the forensic scientist could testify as to the statistics.

> The Witness: The data that has been accumulated by the Federal Bureau of Investigation that they have found the same physical properties in three point eight percent [3.8%] of their glass samples that they have examined.
>
> The Court: What does that mean? Can you--can you explain it any more? I don't know that I understand that exactly. Maybe the jury does. I don't believe I do.
>
> The Witness: From a statistical standpoint, utilizing the FBI, four out of one hundred samples could have the same physical properties.
>
> *1358 The Court: Four out of one hundred?
>
> The Witness: Yes, sir.

Id.

Johnson now complains that his trial counsel failed to make a proper objection to this evidence. He argues that trial counsel incorrectly objected on the basis that the expert witness based his conclusion on hearsay evidence when they should have objected that the State had failed to lay a proper foundation for the expert's opinion. As resolution of the deficient performance issue would require the court to delve into the murky depths of Alabama law on expert testimony, [FN46] the court finds it "easier to dispose of [the] ineffectiveness claim on the ground of lack of sufficient prejudice," and so will take the Supreme Court's advice and deal solely with this issue. *Strickland*, 466 U.S. at 697, 104 S.Ct. 2052.

FN46. This issue is a confusing one. By one Justice's own admission, the Alabama Supreme Court has sent some "mixed signals" in this area. *W.S. by C.S. v. T.W.*, 585 So.2d 26, 28 (Ala.1991) (Houston, J., concurring). However, the general rule in Alabama now appears to be that an expert can give an opinion based on hearsay and opinions obtained from others, but only if the information relied on is first introduced into evidence. *See id.* at 28-29; *Morris v. Young*, 585 So.2d 1374, 1377 (Ala.1991). The rules in place at the time of Johnson's trial were even more restrictive, and apparently allowed the expert to testify only from either (1) personal knowledge or (2) facts provided in a hypothetical. *See Nash v. Cosby*, 574 So.2d 700 (Ala.1990) (altering the rules). Nonetheless, the Alabama courts have apparently deviated from this rule from time to time, and have allowed an expert to testify based on hearsay outside the record, though only if it was of a type "customarily relied upon by experts and likely to be trustworthy." *Brown Mechanical Contractors v. Centennial Ins. Co.*, 431 So.2d 932, 944 (Ala.1983). It is

unclear how these cases can be reconciled with those stating a more stringent standard. The Brown standard mirrors the more general rule that hearsay evidence can be admitted via an expert's testimony if these requirements are met, and one commentator has opined that Brown may reflect an understanding that the hearsay was or at least could have been admitted into evidence, and so could properly be relied on by the expert. *See* Charles W. Gamble, McElroy's Alabama Evidence § 127.02(5) & n. 7; *Volkswagen of Am., Inc. v. Marinelli*, 628 So.2d 378 (Ala.1993). In any event, given the uncertain state of the law, it is difficult to determine whether petitioner's counsel's hearsay objection was such a bad one. Indeed, it is even unclear whether it was all that different from petitioner's "foundation" objection, which allegedly would have required proof that "experts in the field commonly use the data as the basis for similar conclusions." Petitioner's Memorandum at 51. Note that under Alabama law this same standard would be required for admission over a hearsay objection under the rule of Brown and Marinelli, so the proper objection might have been hearsay after all. The court also notes that the trial court asked and was informed that the FBI glass data was commonly used in the field, perhaps satisfying either standard. To confuse matters further, there is some dispute about how broadly the State's expert's testimony should be interpreted. *See, e.g., Johnson*, 612 So.2d at 1301 (taking a narrow view). Because of all of these complexities, the court prefers to simply leave this issue unresolved.

Petitioner's argument on the prejudice question relies heavily on an Eleventh Circuit case which addressed the admission of expert testimony in somewhat similar circumstances. In *Chatom v. White*, 858 F.2d 1479 (11th Cir.1989), the court found a petitioner had been denied the effective assistance of counsel when his trial attorney failed

to object to an expert's testimony concerning an "atomic absorption test" that the prosecution used to prove that the petitioner shot and killed the victim in that case.

The state's case against Chatom consisted entirely of circumstantial evidence, no eyewitness could place Chatom as the individual who shot the officers nor could anyone even place Chatom in the vicinity of the area of the swamp where the shooting occurred. *See generally Chatom*, 348 So.2d 828 (Ala.Crim.App.1976), *rev'd* 348 So.2d 838 (Ala.1977), on remand 348 So.2d 843 (Ala.Crim.App.1977). Thus, the introduction of the atomic absorption test constituted a pivotal point in the trial in that it had the potential to reasonably establish in the jurors minds the fact that Wilson did not fire a gun and reasonably raise the inference that *Chatom* did. The Alabama *1359 Court of Criminal Appeals recognized the importance of the test results at trial when it stated:

> The most damaging evidence against the appellant [at trial] consisted of the results of an 'atomic absorption test.' The atomic absorption test allegedly will show whether a person has recently fired a gun. The State, by use of the atomic absorption test sought to show that Wilson had not fired a gun on November 17, 1975. If Wilson did not fire a gun on the day in question, then there would be a strong inference that someone else, possibly the appellant, shot [the deputies].

Chatom, 348 So.2d at 831 (emphasis added).

Chatom, 858 F.2d at 1485-86. The Eleventh Circuit found prejudice in large part because the circumstantial evidence in the case left a "close question" as to Chatom's guilt, and the atomic absorption evidence "could raise or may have supported a multitude of inferences damaging to Chatom."

Id. at 1487.

This case differs from *Chatom* in several key respects. The evidence against Johnson was significantly stronger than that offered by the State in *Chatom*. More importantly, the issue on which the statistical evidence was useful-- Johnson's presence at the scene--was one of the strongest parts of the State's case. As the Alabama Court of Criminal Appeals rightly pointed out, while helpful, the statistical evidence was essentially cumulative.

> Even without the probability statement, the properly admitted evidence concerning the refractive indexes of the glass was very specific and probative. Moreover, given the position of the victim at the time of the gunfight (sitting on a couch in the living room) and the height of the bullet wound in Johnson's back as compared with the height of the bullet hole in the glass pane of the carport door at the victim's house, the jury could reasonably conclude that the bullet which was removed from Johnson's back was fired by the victim. This conclusion is bolstered by the fact that the bullet removed from Johnson's back was also of the same caliber, had been made by the same manufacturer, and had the same number of lands and grooves as other bullets fired from the pistol used by the victim.
>
> Finally, Johnson has not even suggested any alternative explanation for how he came to have a bullet with all those similarities to other bullets fired from the victim's pistol lodged in his back shortly after

> the exchange of gunfire took place. Therefore, in light of this overwhelming independent evidence linking the bullet removed from Johnson's back to the bullet that Cantrell fired at the second robber, there certainly is not a reasonable probability that if trial counsel had made a different objection to the probability evidence, the result of the trial would have been different. Hence, the trial court properly denied Johnson's claim of ineffective assistance of counsel on this ground.

Johnson, 612 So.2d at 1301-02. This court agrees.

Even though it was largely circumstantial, the evidence against Johnson was very strong. The fact that the bullet removed from his back matched up with the evidence from the scene in so many characteristic ways created a very high probability that the jury would have found that the bullet came from Mr. Cantrell's gun even without the statistical evidence. This court's review of the record suggests that this evidence constituted a small part of the overall picture linking Johnson to the robbery and murder of Mr. Cantrell. There being no prejudice, there is no claim of ineffective of counsel in this regard.

2. Claims of Ineffective Assistance of Counsel on Appeal.

In addition to his claim that his trial counsel were ineffective, Johnson asserts that his counsel on appeal, John Mays, was constitutionally inadequate in three respects. First, according to the petitioner, appellate counsel inadequately framed the *1360 statement of facts in his briefs to the Alabama Court of Criminal Appeals and the Supreme Court of Alabama, including in the brief inaccurate factual assertions and omitting pertinent facts while asserting

irrelevant ones. Second, he claims that counsel performed inadequately in presenting only two grounds for reversal when other, more substantial, claims were available. Finally, the petitioner contends that appellate counsel's brief to the Supreme Court of Alabama was merely a copy of his brief to the Court of Criminal Appeals, without alteration or any attempt to respond to the reasoning of the lower court. The petitioner claims that by simply submitting his first brief to the Alabama Supreme Court, Mays tacitly assented to the Court of Criminal Appeals' analysis.

The standards applicable to petitioner's claims of ineffectiveness against trial counsel apply equally to the charges leveled against his appellate lawyer. *Heath v. Jones*, 941 F.2d 1126, 1130 (11th Cir.1991), cert. denied, 502 U.S. 1077, 112 S.Ct. 981, 117 L.Ed.2d 144 (1992); *Orazio v. Dugger*, 876 F.2d 1508 (11th Cir.1989). To prevail, Johnson must demonstrate both that his attorney's performance fell below reasonable professional standards and that he was prejudiced by that substandard performance. *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052. The courts indulge a presumption that counsel was effective and must not, from the vantage point of hindsight, second guess counsel. Id. at 689. On habeas review the court must "review the merits of the [omitted or poorly presented] claim." *Cross v. United States*, 893 F.2d 1287 (11th Cir.), *cert. denied*, 498 U.S. 849, 111 S.Ct. 138, 112 L.Ed.2d 105 (1990).

i. Adequacy of Statement of Facts On Appeal.

In his brief to the Alabama Court of Criminal Appeals, the petitioner's appellate counsel presented the facts surrounding the petitioner's conviction in a narrative that summarized the events at trial, accurately stating for the most part the testimony of each witness and the actions taken by the attorneys and the court. Mays did not attempt to reorder

the relevant events in a persuasive or elegant fashion, but simply recited them in the order in which they occurred. It is this format that forms the primary basis for the petitioner's criticisms. To some degree, the criticism is well-deserved--Mays' recitation of the facts was a far cry from a stylized masterpiece. One could certainly imagine a rendition of the trial testimony that would likely be more effective or persuasive. Despite his inartful drafting, however, Mays adequately communicated the underlying facts necessary to support his argument. No egregious errors or misstatements were made. The result was a useful, if workmanlike, summary of the record for the use of the appellate court. Under these circumstances, the court simply cannot conclude that Mays' recitation of the trial evidence was "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690, 104 S.Ct. 2052.

ii. Adequacy of Issues Presented on Appeal.

The petitioner argues that the two guilt-related arguments raised as errors by his appellate counsel--that a particular juror should not have been struck for cause and that a motion for judgment of acquittal should have been granted because the trial evidence was insufficient to support his conviction--were two of the less serious errors that should have been raised. He further claims that, rather than the faulty and weak arguments actually raised, appellate counsel should have asserted many of the more substantial claims presented in this petition.

At the outset, it must be observed that appellate counsel is neither required nor expected to present every possible issue on direct appeal. The duty of counsel in all criminal cases to exercise professional judgment in the selection of which issues to present was recently restated by the Court of Appeals for the Eleventh Circuit:

*1361 Even in a death-penalty case, the court expects counsel to be highly selective about the issues to be argued on appeal and about the number of words used to press those issues.... [D]irecting busy lawyers to sharpen and to simplify their arguments ... experience has taught us--makes cases stronger, not weaker.

Our views on what constitutes effective advocacy are not heretical. Justice Story wrote these words: "Who's a great lawyer? He, who aims to say the least his cause requires, not all he may." Joseph Story, Memorandum--book of arguments before the Supreme Court, 1831-32, in Life and Letters of Joseph Story 2:90 (William W. Story ed. 1851). Justice Holmes once said, "One has to try to strike the jugular and let the rest go." Oliver Wendell Holmes, Speeches 77 (1934).

The Supreme Court of the United States has also stressed in its opinions that the best advocacy relies on selectivity. It is well settled that counsel need not "raise every 'colorable' claim" on appeal. *Jones v. Barnes*, 463 U.S. 745, 103 S.Ct. 3308, 3314, 77 L.Ed.2d 987 (1983). The Supreme Court wrote, "Most cases present only one, two, or three significant questions.... Usually, ... if you cannot win on a few major points, the others are not likely to help, ..." *Jones*, 103 S.Ct. at 3313 (quoting R. Stern, Appellate Practice in the United States 266 (1981)). And, the former Chief Judge of this circuit, John C. Godbold, has given this advice: "[C]ounsel must select with dispassionate and detached mind the issues that common sense

> and experience tell him are likely to be dispositive. He must reject other issues or give them short treatment." John C. Godbold, Twenty Pages and Twenty Minutes Revisited 14 (1987) (revised version of Twenty Pages and Twenty Minutes--Effective Advocacy on Appeal, 30 Sw.L.J. 801 (1976)).

United States v. Battle, 163 F.3d 1, 1-2 (11th Cir.1998).

It is clear from Mays' testimony during the Rule 20 proceedings that he discussed the issues in the case with trial counsel, carefully studied the trial record, researched the issues, and elected to argue on appeal those that in his judgment offered the greatest opportunities for success. He also took into account how the appellate court might respond to the selected issues. For example, Mays specifically considered and rejected many of the issues petitioner now presses upon him. After considering raising a question about Johnson's participation and intent to kill, Mays decided that argument "would not wash." R20 at 765-766, 769, 784-787, 798. He reached the conclusion that the appellate record adequately supported a finding that the petitioner was involved in the robbery and killing of Mr. Cantrell and that Johnson intended to kill him. R20 at 784, 798. Counsel chose instead to argue the propriety of the court's removal of a potential juror based upon her views concerning the death penalty. He felt it was a strong issue, knowing, as he did, that the improper removal of a single juror under those circumstances would require reversal of the conviction. R20 at 781-82. "This process of 'winnowing out weaker arguments on appeal and focusing on' those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy." *Smith v. Murray*, 477 U.S. 527, 536, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986)

(quoting *Jones v. Barnes*, 463 U.S. 745, 751-52, 103 S.Ct. 3308, 3314, 77 L.Ed.2d 987 (1983)).

The record establishes that Mays engaged in the kind of considered decision making that the courts have said is virtually unassailable. *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052. The Supreme Court's observation about trial counsel is equally true with regard to appellate counsel: "There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Id.* at 689, 104 S.Ct. 2052. Furthermore, while habeas counsel argues that Mays should have raised on appeal most, if not all, of the issues they have raised here, this court's examination of those issues *1362 suggests that they would have met with no more success than those actually raised on direct appeal. Accordingly, appellate counsel's failure to raise them can hardly be considered ineffective assistance of counsel under Strickland.

iii. Brief to Alabama Supreme Court on Direct Appeal.

The petitioner claims that appellate counsel should have specifically addressed the conclusions reached by the Court of Criminal Appeals in his petition for a Writ of Certiorari to the Supreme Court of Alabama. The State responds that Mays believed the arguments presented in his initial brief were sufficient to alert the Alabama Supreme Court of the issues counsel had raised before the Court of Criminal Appeals.

The court's analysis, above, demonstrates that Mays considered the course of the appeal in Johnson's case. Certainly, another lawyer might well have prosecuted the appeal differently. That does not, however, require a finding

that petitioner's counsel was ineffective for failing to file a more vigorous and expansive brief with the Alabama Supreme Court. Such an act was well within the boundaries of "reasonably professional judgment." *Strickland*, 466 U.S. at 690, 104 S.Ct. 2052. Perhaps most importantly, the petitioner has utterly failed to demonstrate a reasonable probability that a different brief would have produced a different result. As a result, his claim that his appellate counsel was ineffective is without merit.

D. The *Brady* Claim.

Petitioner asserts that the State violated the rule set forth in *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), when it failed to produce "all information favorable to the defense" as requested in the defendant's pretrial discovery motion. As the Supreme Court recently noted, "there are three essential components of a true *Brady* violation: the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; it must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999). The items petitioner points to as *Brady* material are (1) a case report prepared by the Alabama Bureau of Investigation (ABI), which suggested that the police had identified suspects other than Johnson, indicated that the victim had fired the first shot, and contained statements taken from the men present in the motel room at the time of petitioner's arrest; and (2) documentary evidence that the state was investigating two other suspects in connection with the murder of Mr. Cantrell. [FN47] Petitioner claims that the suppressed information was exculpatory and material to his defense because it suggested that two other individuals actually killed Mr. Cantrell and that the victim fired the first shot--both facts which tended to

negate the requisite intent element of capital murder. [FN48] In addition, petitioner alleges that the materials contained information that could have been used to impeach the *1363 testimony of two of the state's witnesses, David Lindsey and Sergeant H.D. Newell.

FN47. This evidence consists of (1) an undated set of notes which indicated that a woman named Louise Blevin told someone that Garland McCulloch would do anything for money, had guns, and was a companion to Johnson and others; (2) a sheet of paper with "Garland #1" scribbled on it; and (3) a page of notebook paper with the names Ray McCulloch, Garland McCulloch, Wayne McCulloch, and Jerry, along with the words "beverages," "Hartselle," and "79 Olds."

FN48. Petitioner asserts that the ABI Report indicates Mr. Cantrell fired the first shot, which, he seems to argue, would negate the intent element of capital murder. The court does not understand this argument. There is no indication that the segment of the ABI Report dealing with the exchange of gunfire is meant to convey a chronology of events. Even if it were, however, the order of gunfire in a shootout during a robbery could have virtually no exculpatory effect as to any element of capital murder. *See Johnson*, 612 So.2d at 1294-95 (citing *Hopper v. Evans*, 456 U.S. 605, 613, 102 S.Ct. 2049, 2054, 72 L.Ed.2d 367 (1982)).

1. The " Exculpatory Evidence" Requirement.

"Brady requires the disclosure of material evidence favorable in the sense of mitigation or exculpation, and also requires the prosecution to disclose evidence important and

useful for impeachment purposes." *Calley v. Callaway*, 519 F.2d 184, 221 (5th Cir. 1975) (en banc), cert. denied, 425 U.S. 911, 96 S.Ct. 1505, 47 L.Ed.2d 760 (1976) (citing *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972)). While admitting that none of the alleged Brady material would have been admissible, petitioner alleges that the exculpatory requirement of Brady has been satisfied because the materials could have been used to impeach the testimony given at trial by Sergeant Newell and David Lindsey. Documents contained in the police file indicated that the McCulloch brothers were responsible for the shots fired during the robbery, and that several other suspects may also have been involved. Petitioner argues that because this explanation of events is inconsistent with the state's theory of the crime, Sergeant Newell's testimony at trial could have been impeached with the information, thereby discrediting his account of the crime and, consequently, the State's case. The statements of the men present in the motel room at the time of petitioner's stay would have been useful for impeachment of Lindsey, argues Johnson, because they are inconsistent with Lindsey's testimony. Petitioner argues that this information individually or collectively satisfies the exculpatory requirement of *Brady*. Because the duty to disclose evidence includes impeachment evidence as well as exculpatory evidence, *United States v. Bagley*, 473 U.S. 667, 676, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), this information would be subject to disclosure if Johnson is correct about its value as impeachment material.

The court finds that very little, if any, of the allegedly suppressed information could have been useful to the defense counsel before or at trial. The information regarding the existence of other suspects established, at best, that there may have been participants other than Johnson in the attempted robbery of the Cantrells. This fact was clear, of course, from

the evidence at trial, both testimonial and forensic. It also conformed perfectly with the petitioner's rendition of the events at the Cantrell home--a rendition which Johnson conveyed to his attorneys and which guided their strategy at trial. [FN49] Accordingly, the court is entirely unable to see how evidence that suggested the existence of additional participants but did not call into doubt Johnson's participation could have been utilized by counsel to discredit Sergeant Newell's testimony.

FN49. Petitioner claims that his counsel could have argued more subtle distinctions. For example, they could have contended that the McCulloch brothers were the killers and Garland was the A.B.I.'s number one suspect. The court fails to see how this would have been useful. The McCullochs apparently were involved and, at least according to the petitioner, Garland McCulloch killed Cantrell. But this does not mean that Johnson was not involved, or indeed that he was not the second man. None of the notes or statements were sufficiently detailed to shed any light on this question.

The court is also somewhat skeptical about the value to the defense of the statements from the men who were in the motel room with Johnson. However, for purposes of argument the court is willing to indulge the petitioner's claim that these statements could have contributed to defense counsel's efforts to impeach David Lindsey. As will be shown below, however, the effect at trial of any such efforts would likely have been inconsequential.

2. The Suppression Requirement.

Because it is not central to the petitioner's Brady claim, the court will assume for the purposes of this

discussion that Johnson has satisfied the requirement that the allegedly exculpatory materials actually be suppressed by the government. The court *1364 merely notes that the Eleventh Circuit has firmly held that "there is no suppression, and thus no Brady violation, if either the defendant or his attorney knows before trial of the allegedly exculpatory information." *Felker v. Thomas*, 52 F.3d 907 (11th Cir. 1995) (citing *United States v. Valera*, 845 F.2d 923, 927-28 (11th Cir. 1988), *cert. denied*, 490 U.S. 1046, 109 S.Ct. 1953, 104 L.Ed.2d 422 (1989); *Halliwell v. Strickland*, 747 F.2d 607, 609 (11th Cir.1984), *cert. denied*, 472 U.S. 1011, 105 S.Ct. 2711, 86 L.Ed.2d 726 (1985); *United States v. Cravero*, 545 F.2d 406, 420 (5th Cir.1976), *cert. denied*, 430 U.S. 983, 97 S.Ct. 1679, 52 L.Ed.2d 377 (1977)). *See also Wright v. Hopper*, 169 F.3d 695, 702 (11th Cir.1999) ("the state is not required to furnish a defendant with exculpatory evidence that is fully available through the exercise of due diligence"). In the court's view, a strong argument could be made that certain information allegedly suppressed--including the identities of the other suspects and of the men in the hotel room--was known to the defendant long before trial. Much of this information was available from Johnson's own personal knowledge. *See Felker*, 52 F.3d at 910.

3. The Materiality Requirement.

Even assuming for the sake of argument that the materials in question were exculpatory or impeaching and were suppressed by the prosecution, the petitioner falls short on the third prong of a valid Brady claim: materiality. The Supreme Court has recently said that suppressed exculpatory evidence "is material 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' " *Strickler*, 119 S.Ct. at 1948 (quoting *Bagley*, 473 U.S. at 682, 105 S.Ct. 3375). "The question is not whether the defendant would

more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles v. Whitley*, 514 U.S. 419, 434, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). The materiality of undisclosed evidence is to be determined from an evaluation of the evidence "collectively, not item-by-item." *Id.* at 436, 115 S.Ct. 1555. In addition, the admissibility of the material in question is not dispositive of whether it is exculpatory. *Sellers v. Estelle*, 651 F.2d 1074, 1077 n. 6 (5th Cir.1981); *see also United States v. Phillip*, 948 F.2d 241, 250 (6th Cir.1991).

An examination of all the materials allegedly suppressed by the prosecution reveals almost no likelihood that disclosure of the materials would have had any significant impact on the trial. At best, disclosure of the materials would have had two consequences: (1) defense counsel would have had more evidence that people other than Johnson were involved in the robbery; and (2) they would have been able to cross-examine David Lindsey about his testimony that Johnson essentially admitted participation in the robbery and killing. These "advantages" would be of minimal value to the defense, both separately and collectively. Even if the cumulative effect of all the alleged Brady material is considered, the petitioner has not met his burden of establishing a reasonable probability that the result would have been different. *Strickler*, 119 S.Ct. at 1953 (citing *Kyles*, 514 U.S. at 434, 115 S.Ct. 1555).

The likelihood that the disclosure of information regarding the other suspects would have impacted the strategy of the defense in such a way as to result in a different outcome is negligible. As noted earlier, this information was a surprise to no one, and was in fact consistent with Johnson's own story about what had

happened. The participation of others, whether as the first man into the house or a getaway driver, has absolutely no impact on the guilt of the petitioner as established at trial. The only possible theory such evidence could have supported is the "third man" theory rejected by the court earlier in this opinion. In the court's view, the fact that counsel for the petitioner was cognizant of nearly all of the information and *1365 chose not to pursue any in-depth investigation indicates fairly convincingly that disclosure of further information on this point would have changed very little.

The allegedly suppressed statements of the men present in the motel room would also have been of little value to Johnson's trial counsel. The Fifth Circuit has made clear that the threshold for a *Brady* claim based on potentially impeaching evidence is somewhat stringent. In *Calley v. Callaway*, that court held that "when *Brady* is invoked to obtain information not favorable on the issue of guilt or innocence but useful for attacking the credibility of a prosecution witness, the information withheld must have a definite impact on the credibility of an important prosecution witness in order for the nondisclosure to require reversal." *Calley*, 519 F.2d at 222. Here, none of the statements in question indicate that the individuals were constantly present in the motel room nor that they witnessed every occurrence that took place in the room. Likewise, none of the men stated that they heard Johnson provide an innocent explanation for his wound. Most of them did not mention Johnson's alleged admission at all. While Russell Lovell's statement acknowledges that he "never heard Keith state anything about being shot," R20 at 985, even this statement contains nothing that directly contradicts Lindsey's testimony. It simply cannot be said that the declarations of witnesses that do not contradict, but merely fail to corroborate, Lindsey's testimony about what Johnson said in the motel room would

have had any "definite impact on [Lindsey's] credibility" as a witness. *Calley*, 519 F.2d at 222.

In conclusion, there is no evidence that a violation of the rule announced in *Brady v. Maryland* occurred in the petitioner's case. Even if it is assumed that the circumstances satisfy the *Brady* requirements that the state suppressed evidence that is favorable or exculpatory, petitioner can make no showing that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 473 U.S. at 682, 105 S.Ct. 3375.

E. The *Cage* Claim.

Mr. Johnson asserts that the jury was improperly instructed on the meaning of "proof beyond a reasonable doubt," contrary to the Supreme Court's holding in *Cage v. Louisiana*, 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990) (per curiam), overruled on other grounds, *Estelle v. McGuire*, 502 U.S. 62, 73 n. 4, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991). It is by now well-established that the Due Process Clause of the Fourteenth Amendment "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). The concept of reasonable doubt "plays a vital role in the American scheme of criminal procedure." Id. at 363, 90 S.Ct. 1068. An obvious corollary to the Winship principle is that a jury instruction which by its language lowers the government's burden below that of proof beyond a reasonable doubtis prohibited. *See Cage*, 498 U.S. at 40-41, 111 S.Ct. 328. In fact, conviction by a jury improperly instructed on reasonable doubt is one of the few constitutional errors which will always invalidate the conviction. *Sullivan v. Louisiana*, 508 U.S. 275, 279-80, 113

S.Ct. 2078, 2081-82, 124 L.Ed.2d 182 (1993) (citing *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927); *McKaskle v. Wiggins*, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984)). The Eleventh Circuit, relying largely on the rule announced in *Sullivan*, has held that claims under Cage v. Louisiana are excepted from the general practice "that a new rule of law will not be applied to cases on collateral review where conviction was final prior to the new rule's announcement." *Nutter v. White*, 39 F.3d 1154, 1157 (11th Cir.1994) (citing *Teague v. Lane*, 489 U.S. 288, 310, 109 S.Ct. 1060, 1075, 103 L.Ed.2d 334 (1989)).

*1366 1. Procedural Default.

Before turning to the merits of the petitioner's Cage claim, however, the court must address a threshold issue raised by the State--whether the claim has been procedurally defaulted, as found by the Alabama Court of Criminal Appeals during Johnson's Rule 20 proceedings. *See Johnson v. State*, 612 So.2d 1288, 1292 (Ala.Crim.App.1992). There is no dispute that Johnson's attorneys failed to object to the reasonable doubt instruction given to the jury and failed to raise the issue on appeal. Under former Rules 20.2(a)(3) and 20.2(a)(5), A.R.Crim.P.Temp., [FN50] which were applicable at the time, the claim was procedurally barred. The Alabama Court of Criminal Appeals' denial of relief thus rested upon "adequate and independent state grounds" and is not subject to collateral review by a federal court. *Harris v. Reed*, 489 U.S. 255, 261, 109 S.Ct. 1038, 1042, 103 L.Ed.2d 308 (1989).

FN50. Rule 20.2(a)(3), A.R.Crim.P.Temp., provided: "A petitioner will not be given relief under this rule based upon any ground ... [w]hich could have been but was not raised at

trial." Rule 20.2(a)(5), A.R.Crim.P.Temp., provided: "A petitioner will not be given relief under this rule based upon any ground ... [w]hich could have been but was not raised on appeal."

The petitioner would excuse his procedural default on this issue by claiming that his attorneys, both trial and appellate, were ineffective by reason of their failure to challenge the reasonable cause instruction. *See, e.g., Murray v. Carrier*, 477 U.S. 478, 488, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986). As will be seen, the jury instruction now challenged by habeas counsel, taken as a whole, was not objectionable and neither trial nor appellate counsel were ineffective because they did not challenge it. There is, therefore, neither "cause" nor "prejudice" sufficient to excuse the petitioner's procedural default. The claim is thus defaulted.

2. The Merits of the Claim.

Alternatively, if the challenge to the reasonable doubt instruction had not been defaulted and if the court were to address the claim on the merits, the petitioner's Cage claim would still fail. At the close of the evidence at Johnson's trial, the judge gave the jury the following instruction on reasonable doubt: [FN51]

FN51. Though lengthy, the entire jury instruction on the State's burden of proof is reproduced here; the Supreme Court has directed the court to assess whether "taken as a whole, the instructions correctly conveyed the *concept of reasonable doubt to the jury." Holland* v. United States, 348 U.S. 121, 140, 75 S.Ct. 127, 137, 99 L.Ed. 150 (1954).

The Court charges the jury that [sic] the burden of proof is upon the State, and it [is] the duty of the State to show beyond a reasonable doubt and to the exclusion of every other reasonable hypothesis every circumstance necessary to show that the Defendant is guilty, before the Defendant is required to introduce any evidence in his favor or to explain any circumstance surrounding him, and if there is a reasonable doubt of the Defendant's guilt, then you must acquit the Defendant.

The State has the burden of proving guilt of the Defendant beyond a reasonable doubt, and this burden remains on the State throughout the case. The Defendant is not required to prove his innocence.

I charge you, members of the jury, that the State has the burden of proof in this case, and if, after hearing all the evidence, your mind is left in such a state that you must resort to speculation or guesswork as to the Defendant's guilt or innocence, then the State has not proved to you beyond a reasonable doubt that the Defendant is guilty, and you must acquit the Defendant.

The Court charges the jury that a person charged with a felony should not be convicted unless the evidence excludes to a moral certainty every reasonable hypothesis but that of his guilt; no matter how strong the circumstances are, they do not come up to the full measure *1367 of proof, which the law requires, if they can [sic] reasonably

reconciled with the theory that the Defendant is innocent.

Where the proof of any element of the crime charged against the Defendant is based on circumstantial evidence, then I charge the jury that to justify a conviction of crime the actions of the defendant must be inconsistent with every reasonable theory of innocence.

I want to talk to you a little bit about reasonable doubt. I will read something to you first, and then I will talk to you a little more at length. This is the standard that you will use in evaluating this testimony to determine whether or not the State has met the burden of proof.

A reasonable doubt is a fair doubt, based upon reason and common sense, and arising from the state of the evidence. While it is rarely possible to prove anything to an absolute certainty, suspicion or conjecture, a reasonable doubt may arise not only from the evidence produced, but also from a lack of evidence.

The burden is upon the State to prove the Defendant guilty beyond a reasonable doubt of every essential element of the crime charged. A Defendant has the right to rely upon failure of the prosecution to establish such proof. A Defendant may also rely upon evidence brought out on cross-examination of witnesses for the prosecution and upon evidence presented on behalf of the Defendant.

The law never imposes upon a Defendant in a criminal case the burden or duty of producing any evidence.

A reasonable doubt exists in any case when, after careful and impartial consideration of all the evidence in the case, the jurors do not feel convinced to a moral certainty that a defendant is guilty of the charge.

Upon considering all the evidence, or lack of evidence, if you have a reasonable doubt about the Defendant's guilt, arising out of any part of the evidence or lack of evidence, you should find the Defendant not guilty.

I charge you, members of the jury, that the law requires proof of guilt beyond a reasonable doubt. The concept of reasonable doubt is applicable to every single element of the crime charged. The concept of reasonable doubt is also certainly applicable to the identity of any person charged with a crime. If you are not satisfied beyond a reasonable doubt as to any element of the offense charged, you must find the Defendant guilty. The same is true of identity. If you are not satisfied beyond a reasonable doubt that any offense charged was committed by the defendant, you must then find the Defendant not guilty.

I charge you, members of the jury, that the State must prove beyond a reasonable doubt the identity of the perpetrator of a crime. If you are not satisfied beyond a reasonable doubt as to the identity of the Defendant as the perpetrator of the offense charged, you must find the Defendant not guilty.

The Jury is instructed that, if the evidence is reasonably consistent with the Defendant's innocence, you should promptly acquit him.

The Jury is instructed that the Defendant cannot be convicted unless the evidence is inconsistent with any reasonable theory of innocence.

Now, let me say without reading something on the subject of reasonable doubt. As I said, this is the standard that you are going to have to measure this case by.

Now, this is how you will determine whether or not the State has met the burden of proof. Have they proved the Defendant's guilt beyond a reasonable doubt and to a moral certainty.

The law, when it uses the expression beyond a reasonable doubt and to a moral certainty, doesn't mean two different things.

Beyond a reasonable doubt and to a moral certainty are simply two ways of expressing the same idea or same concept. In my judgment the law has had a *1368 little difficulty in positively defining the concept of reasonable doubt. Most of the definitions take on a negative concept. One positive definition has been said to be a reasonable doubt is a doubt for which a good reason can be given or can be assigned. Proof beyond a reasonable doubt is not proof beyond every possible doubt. Proof to a moral certainty is not proof to a mathematical or scientific certainty, because anything concerning human affairs and human conduct of necessity must be open

to some possible doubt to say the least. A reasonable doubt is not a fanciful doubt. It is not a vague or speculative or uncertain doubt. It is what it says. It is a reasonable doubt. It is such a doubt as would arise by the evidence offered by the State or by the Defense or by a lack or want or insufficiency of evidence offered by the State. It is stated in the final analysis that if a jury, after considering all of the evidence, have an abiding conviction in their mind and heart of the guilt of the Defendant, they don't have a reasonable doubt. If they don't have such an abiding conviction, they do.

One definition has been expressed by our Supreme Court in this language, and I like this, the doubt which requires an acquittal in a criminal case is actual and substantial. It is not any doubt or some mind indulging doubt or every question which may be suggested and on which they must act. It is not mere possibility or speculation that the imagination creates. It is a doubt the evidence generates when the jury carefully weighing all the evidence cannot say they feel an abiding conviction of the defendant's guilt.

As I said, this is not a mathematical or scientific concept, and I have found that, depending on what training and background people have, some people have a little difficulty with that. You take an engineer, a scientist, a mathematician or an accountant, when you say proof to him, it takes on a very concise and direct concept. What we deal with here is human affairs and human endeavors. The law paints in broad strokes. So it only

> knows how to deal with human affairs by human measurements and by human concepts. And so in evaluating this case and in evaluating this testimony, don't be overawed by the fact that you are concerned with the law. The inherent experience, instincts, common sense and the background and history of all of your previous experiences as human beings are great and valuable tools in applying and evaluating this.
>
> The law even goes so far on the concept of reasonable doubt to say that each juror, if he has--if he or she has difficulty with the definition that I have given you, has his or her own right to take the words "reasonable doubt" and give them the logical and consequential conclusion and definition that he or she finds. In the final analysis you determine what is a reasonable doubt and what is not a reasonable doubt.

Tr. at 841-49.

The petitioner contends that the instruction was flawed because the trial judge equated "beyond reasonable doubt" with "moral certainty," thereby lowering the State's burden of proof. The petitioner also argues that the trial judge's instruction that each juror "has his or her own right to take the words 'reasonable doubt' and give them the logical and consequential conclusion and definition that he or she finds" impermissibly permitted the jury to reduce the State's burden of proof below that required for conviction under the Sixth Amendment. In response, the State argues that the instruction given by the trial judge in the instant case, as it relates to the language concerning "moral certainty" and "actual and substantial doubt," is akin to the instruction

analyzed in *Harvell v. Nagle*, 58 F.3d 1541 (11th Cir. 1995) *cert. denied*, 517 U.S. 1225, 116 S.Ct. 1859, 134 L.Ed.2d 958 (1996), which the Eleventh Circuit Court of Appeals found to be consistent with the constitutional requirements. The State apparently does not reply to petitioner's concerns involving the *1369 trial judge's comments about the jury's authority to disregard his earlier instructions.

In *Cage v. Louisiana*, 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990) (per curiam), overruled on other grounds, *Estelle v. McGuire*, 502 U.S. 62, 73 n. 4, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991), the petitioner was convicted of first degree murder and sentenced to death. At trial, the court's instruction to the jury stated in relevant part:

> If you entertain a reasonable doubt as to any fact or element necessary to constitute the defendant's guilt, it is your duty to give him the benefit of that doubt and return a verdict of not guilty. Even where the evidence demonstrates a probability of guilt, if it does not establish such guilt beyond a reasonable doubt, you must acquit the accused. This doubt, however, must be a reasonable one; that is one that is founded upon a real tangible substantial basis and not upon mere caprice and conjecture. It must be such doubt as would give rise to a grave uncertainty, raised in your mind by reasons of the unsatisfactory character of the evidence or lack thereof. A reasonable doubt is not a mere possible doubt. It is an actual substantial doubt. It is a doubt that a reasonable man can seriously entertain. What is required is not an absolute or mathematical certainty, but a moral certainty.

Id. at 40, 111 S.Ct. 328. The Supreme Court held that the instruction was contrary to the burden of proof articulated in *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), stating:

> In construing the instruction, we consider how reasonable jurors could have understood the charge as a whole. Francis v. Franklin, 471 U.S. 307, 316, 105 S.Ct. 1965, 1972, 85 L.Ed.2d 344 (1985). The charge did at one point instruct that to convict, guilt must be found beyond a reasonable doubt; but it then equated a reasonable doubt with a "grave uncertainty" and an "actual substantial doubt," and stated that what was required was a "moral certainty" that the defendant was guilty. It is plain to us that the words "substantial" and "grave," as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable-doubt standard. When those statements are then considered with the reference to "moral certainty," rather than evidentiary certainty, it becomes clear that a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause.

Id. at 41, 111 S.Ct. 328.

Barely a year after *Cage* was decided, the Supreme Court clarified the standard to be applied to claims that a jury was improperly instructed on reasonable doubt. *Estelle v. McGuire*, 502 U.S. 62, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991). The Court in *Cage* had reviewed the "reasonable

doubt" instruction for whether a reasonable jury, confronted with the instruction as a whole, could have construed it wrongly. *Cage*, 498 U.S. at 41 (emphasis added). In *McGuire*, the Court stated that the appropriate standard was whether there existed a reasonable likelihood that the jury has applied the instruction in a manner violative of the Constitution. McGuire, 502 U.S. at 72, 112 S.Ct. 475 (emphasis added). For that reason, the Court "disapprove[d] the standard of review language in *Cage*." Id.

In *Victor v. Nebraska*, 511 U.S. 1, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994), the Court explained under what circumstances a reasonable doubt instruction would fail to pass constitutional muster:

> The beyond a reasonable doubt standard is a requirement of due process, but the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course. *Cf. Hopt v. Utah*, 120 U.S. 430, 440-441, 7 S.Ct. 614, 618-20, 30 L.Ed. 708 (1887). Indeed, so long as the court instructs the jury on the necessity that the defendant's guilt be proved beyond a reasonable doubt, see **1370Jackson v. Virginia*, 443 U.S. 307, 320, n. 14, 99 S.Ct 2781, 2789, n. 14, 61 L.Ed.2d 560 (1979), the Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof. *Cf. Taylor v. Kentucky*, 436 U.S. 478, 485-486, 98 S.Ct 1930, 1934-35, 56 L.Ed.2d 468 (1978). Rather, "taken as a whole, the instructions [must] correctly conve[y] the concept of reasonable doubt to the jury." *Holland v. United States*, 348 U.S. 121, 140, 75 S.Ct. 127, 137, 99 L.Ed. 150 (1954).

> In a subsequent case [to *Cage*], we made clear that the proper inquiry is not whether the instruction "could have" been applied in an manner, but whether there is a reasonable likelihood that the jury did so apply it. *Estelle v. McGuire*, 502 U.S. 62, 72, and n. 4, 112 S.Ct. 475, 482 and n. 4, 116 L.Ed.2d 385 (1991). The constitutional question in the present cases, therefore, is whether there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the Winship standard.

Victor, 511 U.S. at 5-6, 114 S.Ct. 1239.

The Court then turned to the merits of petitioner Sandoval's [FN52] objection to the trial court's use of the terms "moral certainty" and "moral evidence":

FN52. The Victor opinion actually disposed of two separate cases, *Victor v. Nebraska* and *Sandoval v. California*.

> We are somewhat more concerned with Sandoval's argument that the phrase "moral certainty" has lost its historical meaning, and that a modern jury would understand it to allow conviction on proof that does not meet the beyond a reasonable doubt standard. Words and phrases can change meaning over time: A passage generally understood in 1850 may be incomprehensible or confusing to a modern juror. And although some contemporary dictionaries contain definitions of moral certainty similar to the 19th century

understanding of the phrase, see WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1468 (1981) ("virtual rather than actual, immediate, or completely demonstrable"); 9 OXFORD ENGLISH DICTIONARY, supra, at 1070 ("a degree of probability so great as to admit of no reasonable doubt"), we are willing to accept Sandoval's premise that "moral certainty," standing alone, might not be recognized by modern jurors as a synonym for "proof beyond a reasonable doubt." But it does not necessarily follow that the California instruction is unconstitutional.

Sandoval first argues that moral certainty would be understood by modern jurors to mean a standard of proof lower than beyond a reasonable doubt. In support of this proposition, Sandoval points to contemporary dictionaries that define moral certainty in terms of probability. E.g., WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY, supra, at 1168 ("based on strong probability"); RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1249 (2d ed. 1983) ("resting upon convincing grounds of probability"). But the beyond a reasonable doubt standard is itself probabilistic. "[I]n a judicial proceeding in which there is a dispute about the facts of some earlier event, the factfinder cannot acquire unassailably accurate knowledge of what happened. Instead, all the factfinder can acquire is a belief of what probably happened." In re Winship, 397 U.S. at 370, 90 S.Ct. at 1075 (Harlan, J., concurring) (emphasis in original).

> The problem is not that moral certainty may be understood in terms of probability, but that a jury might understand the phrase to mean something less than the very high level of probability required by the Constitution in criminal cases.
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> * * * * * *
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> As modern dictionary definitions of moral certainty attest, the common meaning of the phrase has changed since it was *1371 used in the Webster instruction, and it may continue to do so to the point that it conflicts with the Winship standard. Indeed, the definitions of reasonable doubt most widely used in the federal courts do not contain any reference to moral certainty. See FEDERAL JUDICIAL CENTER, PATTERN CRIMINAL JURY INSTRUCTIONS 28 (1988); 1 E. DEVITT & C. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 11.14 (3d ed. 1977).

Victor v. Nebraska, 511 U.S. at 13-17, 114 S.Ct. 1239. Because of the context within which the term was used, however, the court concluded that "[w]e do not think it reasonably likely that the jury understood the words 'moral certainty' either as suggesting a standard of proof lower than due process requires or as allowing conviction on factors other than the government's proof." *Id.* at 16, 114 S.Ct. 1239.

The Court also rejected petitioner Victor's argument that equating a reasonable doubt with an "actual and substantial" doubt heightened the degree of doubt necessary for acquittal. Although it found the language "somewhat

problematic," the Court concluded that "the context makes clear that 'substantial' is used in the sense of existence rather than magnitude of the doubt." *Id.* at 19-20, 114 S.Ct. 1239.

Most *Cage* claims that have been addressed on the merits by the Courts of Appeals have involved one or more of the phrases challenged in *Cage* and *Victor*, or variations thereof. *See, e.g., Felker v. Turpin*, 83 F.3d 1303 (11th Cir.1996) ("moral certainty" instruction); *Muhleisen v. Ieyoub*, 168 F.3d 840 (5th Cir.1999) ("grave uncertainty" and "actual or substantial doubt" instruction); *United States v. Williams*, 20 F.3d 125 (5th Cir.1994), *cert. denied*, 513 U.S. 891, 115 S.Ct. 239, 130 L.Ed.2d 162 (1994) ("firmly convinced" and "real possibility" instruction); *Harvell v. Nagle*, 58 F.3d 1541 (11th Cir.1995) *cert. denied*, 517 U.S. 1225, 116 S.Ct. 1859, 134 L.Ed2d 958 (1996) ("actual and substantial doubt" and "moral certainty" instruction); *Gilday v. Callahan*, 59 F.3d 257 (1st Cir.1995), *cert. denied*, 516 U.S. 1175, 116 S.Ct. 1269, 134 L.Ed.2d 216 (1996) ("moral certainty" instruction). Other claims have been based on instructions which equate reasonable doubt with doubt for which a good reason can be given or articulated. See, e.g., *Humphrey v. Cain*, 120 F.3d 526 (5th Cir.1997), *rev'd on other grounds*, 138 F.3d 552 (5th Cir.1998) (en banc); *Beverly v. Walker*, 118 F.3d 900 (2d Cir.1997) cert. denied, 522 U.S. 883, 118 S.Ct. 211, 139 L.Ed.2d 147 (1997); *Vargas v. Keane*, 86 F.3d 1273 (2d Cir.), *cert. denied*, 519 U.S. 895, 117 S.Ct. 240, 136 L.Ed.2d 169 (1996); *Chalmers v. Mitchell*, 73 F.3d 1262 (2d Cir.), *cert. denied*, 519 U.S. 834, 117 S.Ct. 106, 136 L.Ed.2d 60 (1996). While few claims have met with success, several courts have criticized the use of certain language to define proof beyond a reasonable doubt. *See, e.g., Gilday*, 59 F.3d at 262 ("Equating the concept of reasonable doubt to 'moral certainty' may be, in isolation, reversible error"); *Beverly*, 118 F.3d at 903-04 ("charges which state or imply that a juror ought to be able to

'articulate' or 'give' a reason for acquittals present dangers of shifting burdens of proof"); *Harvell*, 58 F.3d at 1543 ("use of the term 'actual and substantial doubt' is somewhat problematic and perhaps even ill-advised").

In the instant case, the trial judge employed the terms "beyond a reasonable doubt" and "to a moral certainty" interchangeably [FN53] and even informed the jury that the two terms were synonymous. No doubt, the jury would have come to believe that the judge thought the two terms were synonymous. On its face, this raises certain constitutional concerns. As has been noted by the Eleventh Circuit, however, the ambiguity injected into an instruction by use of the terms "moral certainty" can be offset by a useful alternative instruction on reasonable doubt. *Harvell*, 58 F.3d at 1545. Here, the judge presented to the jury as *1372 an alternative definition for "beyond a reasonable doubt" in its instruction that it was not to convict Johnson unless it had an "abiding conviction" in its "mind and heart" that the petitioner was guilty. In addition, the judge instructed the jury that the petitioner could not be convicted unless the evidence presented to them was inconsistent with any reasonable theory of innocence. Further, as in Harvell, the trial judge instructed the jury not to go beyond the evidence and engage in speculation in order to find the petitioner guilty. "The combination of the abiding conviction language and the rest of the instruction, which emphasized the jury's obligation to focus on the evidence presented in court, convinces us that it was not reasonably likely that the jury understood the instructions to allow conviction based on proof insufficient to meet the Winship standard." *Id.* at 1545. *See also Bias v. Ieyoub*, 36 F.3d 479, 481 (5th Cir.1994).

FN53. The trial judge equated the two terms eleven times, sometimes more explicitly than others.

In addition to equating "beyond a reasonable doubt" with "moral certainty," the trial judge couched its definition of the term "reasonable doubt" in the language of an "actual and substantial doubt," another criticized term. In Harvell, the Eleventh Circuit specifically addressed the use of the term "actual and substantial doubt" in a reasonable doubt instruction:

> Although the use of the term "actual and substantial doubt" is somewhat problematic and perhaps even ill-advised, the Supreme Court made clear, subsequent to Cage, that the use of such a term in the proper context, bolstered by adequate explanatory language, can survive constitutional scrutiny. *See Victor*, 511 U.S. at [19-21], 114 S.Ct. at 1250; *Adams v. Aiken*, 41 F.3d 175, 182 (4th Cir.1994) ("Victor explains that the offending words can be neutralized by words or phrases that preclude the jury from requiring more than a reasonable doubt to acquit"), *cert. denied*, 515 U.S. 1124, 115 S.Ct. 2281, 132 L.Ed.2d 284 (1995). The instruction challenged in Victor provided in part
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> A reasonable doubt is an actual and substantial doubt arising from the evidence, from the facts or circumstances shown by the evidence, or from the lack of evidence on the part of the state, as distinguished from a doubt arising from mere possibility, from bare imagination, or from fanciful conjecture.

Id. 511 U.S. at 17-19, 114 S.Ct. at 1249.

The Supreme Court held that the actual and substantial doubt language did not violate Victor's due process rights because the rest of the sentence made clear that substantial was being used in "the sense of existence rather than magnitude of the doubt" *Id.* at [19-21], 114 S.Ct. at 1250. In other words, in context, substantial meant actual or real rather than abundant or plentiful.

The surrounding language in the trial court's instruction in Harvell's case likewise established that substantial meant real and not imaginary. The trial court accomplished this in two ways. First, as in Victor, the instruction provided that substantial doubt arises from the evidence itself, stating that reasonable doubt had to be derived from the evidence, lack of evidence, or any part of the evidence. Second, Harvell's instruction stated that reasonable doubt cannot be fanciful, vague, whimsical, capricious, conjectural or speculative.

Id. at 1543 (footnote omitted). Other language in the charge given the jury in the present case, contrasting an "actual and substantial" doubt with other kinds of doubt, makes clear that the phrase was not intended to require more than a "reasonable" doubt. The "actual and substantial" language was used instead to explain that a "reasonable doubt" was not a metaphysical doubt, but a tangible one. First, the trial judge contrasted "actual and substantial doubt" with imaginative or speculative doubt. In addition, the trial judge further defined the requisite doubt as "a doubt the evidence generates when the jury carefully weighing all the evidence cannot say that they feel an abiding conviction of the defendant's guilt." In this court's view, the *1373 overall instruction on reasonable doubt was therefore sufficient to "cure" the problems raised by the offending phrase and meet the requirements of the Due Process Clause.

Finally, in the last paragraph of his instruction, the trial judge told the jury that if they had "difficulty" with the instruction he had given them, they could employ the words "reasonable doubt" according to "the logical and consequential conclusion and definition that he or she finds" and that it was, in the end, the province of the jury to "determine what is a reasonable doubt and what is not a reasonable doubt." There is little question that this construction was confusing, ill-advised and perhaps even dangerous because it could potentially have been taken to suggest that the jury could convict based upon proof different from, and less rigorous than, the very high standard set forth in the preceding paragraphs. However, the court is convinced that this final paragraph was in effect equivalent to the trial court failing to give a specific definition of "reasonable doubt" to the jury at all--a practice which has been approved by, and sometimes even endorsed, by several federal courts. *See, e.g., United States v. Oriakhi*, 57 F.3d 1290, 1300 (4th Cir.), *cert. denied*, 516 U.S. 952, 116 S.Ct. 400, 133 L.Ed.2d 319 (1995) (court should not attempt to define reasonable doubt absent a specific request for a definition from the jury); *Thompson v. Lynaugh*, 821 F.2d 1054, 1060-61 (5th Cir.), *cert. denied*, 483 U.S. 1035, 108 S.Ct. 5, 97 L.Ed.2d 794 (1987) (failure to define reasonable doubt does not deprive a defendant of due process); *United States v. Blackburn*, 992 F.2d 666, 668 (7th Cir.), cert. denied, 510 U.S. 949, 114 S.Ct. 393, 126 L.Ed.2d 341 (1993) (reasonable doubt should not be defined even upon request by the jury). These cases make it clear that a jury's own common sense understanding of the meaning of the term "reasonable doubt" is constitutionally sufficient. That is essentially the meaning which the last portion the judge's instruction left the jury to consider.

Accordingly, the court does not find the final admonition, in conjunction with the remainder of the jury

instruction, resulted in "a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the *Winship* standard. *Victor*, 511 U.S. at 6, 114 S.Ct. 1239.

F. Fourth Amendment Claim.

The petitioner contends that the trial court impermissibly admitted into evidence the .357 magnum handgun and the bullet removed from petitioner's back, both seized by the State in violation of the Fourth Amendment. [FN54] Mr. Johnson claims that the handgun was illegally seized because it was the fruit of a warrantless search. He argues that the bullet was improperly removed from his back because the warrant with which the bullet was obtained was invalid. The State contends that these claims are procedurally defaulted and that under *Stone v. Powell*, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976), the court cannot review the petitioner's Fourth Amendment claims. The State also asserts that each claim is without merit.

FN54. Johnson also asserts that his trial counsel's failure to move to suppress the handgun constituted ineffective assistance of counsel in violation of his Sixth Amendment rights. For the sake of clarity, that argument will be addressed concurrently with petitioner's Fourth Amendment claims.

1. Procedural Default.

The State argues that both of petitioner's claims are defaulted. A procedural bar will not prevent habeas review of a federal claim where the last appellate court authorized by state law to hear the claim decided it on its merits, *Ulster*

County Court v. Allen, 442 U.S. 140, 152- 54, 99 S.Ct. 2213, 2227, 60 L.Ed.2d 777 (1979), or where it is unclear whether the claim was resolved on a procedural basis or on the merits. *1374*Harris v. Reed*, 489 U.S. 255, 265, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989); *Caldwell v. Mississippi*, 472 U.S. 320, 327, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). In addition, if the state court of last resort affirms a lower court decision without comment, the claim will not be barred from review on the merits in the habeas court unless the lower court decision was founded upon the petitioner's procedural default. *Ylst v. Nunnemaker*, 501 U.S. 797, 802, 111 S.Ct. 2590, 115 L.Ed.2d 706 (1991). In this case, the claim concerning the removal of the bullet from the petitioner's back was the subject of plain error review on the merits under Alabama Rule of Appellate Procedure 45A by the Court of Criminal Appeals on direct review. *Johnson v. State*, 521 So.2d 1006, 1014-15 (Ala.Crim.App.1986). As noted above, the Alabama Supreme Court affirmed the opinion of the Court of Criminal Appeals without comment. Johnson, 521 So.2d at 1018. Therefore, the petitioner's Fourth Amendment claim as addressed to the surgical removal of the bullet was presented to and addressed on the merits by the highest court of the State for purposes of procedural default.

The claim involving the seizure of the handgun appears on its face to be defaulted, as it was not raised at trial or on appeal and was not addressed by any Alabama appellate court on its own motion. [FN55] However, as demonstrated below, Johnson's only viable claim with regard to the seizure of the handgun lies in his assertion that he was denied his Sixth Amendment right to the effective assistance of counsel--a claim that has not been defaulted. *See Kimmelman v. Morrison*, 477 U.S. 365, 374 n. 1, 106 S.Ct. 2574, 2582 n. 1, 91 L.Ed.2d 305 (1986). The court therefore need not specifically determine whether petitioner has

defaulted on his claim brought directly under the Fourth Amendment.

FN55. The court notes that during the trial testimony of Harold Newell, an agent of the Alabama Bureau of Investigation, the petitioner's trial counsel requested an opportunity to question the witness regarding the legality of the search of the hotel room, ostensibly for the purpose of making some type of objection to the search. However, no objection was actually made. Tr. at 477-78.

2. *Stone v. Powell.*

In *Stone v. Powell*, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976), the Supreme Court declared that "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, the Constitution does not require that a state prisoner be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." In the instant case, *Stone* clearly prevents the petitioner from directly presenting his claim concerning the seized handgun, which falls fully within the boundaries of a traditional search and seizure problem. Whether defaulted or not, this claim is not properly before the court.

Stone also prevents the petitioner from raising his claim pertaining to the removal of the bullet. The petitioner does not seek habeas relief to prevent the bullet's removal, as was the case in *Winston v. Lee*, 470 U.S. 753, 757, 105 S.Ct. 1611, 84 L.Ed.2d 662 (1985). Instead, the petitioner's claim is that the bullet was unlawfully removed from his body and was then admitted in evidence at his trial. Stone therefore prevents consideration of a direct habeas challenge to the

removal and use of the bullet at trial. "[T]he exclusionary rule, held applicable to the States in *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), 'is not a personal constitutional right'; it fails to redress 'the injury to the privacy of the victim of the search or seizure' at issue, 'for any "[r]eparation comes too late".' " *Withrow v. Williams*, 507 U.S. 680, 686, 113 S.Ct. 1745, 123 L.Ed.2d 407 (1993) (quoting *Stone*, 428 U.S. at 486, 96 S.Ct. 3037).

The Supreme Court has, however, carved out an exception to the rule of *Stone v. Powell* for certain claims. In *Kimmelman v. Morrison*, the Court held that *1375 the *Stone* restriction on federal habeas review of Fourth Amendment claims did not apply to ineffective assistance of counsel claims based on deficient representation with respect to a Fourth Amendment issue. 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986). Finding that the two claims were "distinct, both in nature and in the requisite elements of proof," the Court wrote:

> Although it is frequently invoked in criminal trials, the Fourth Amendment is not a trial right; the protection it affords against governmental intrusion into one's home and affairs pertains to all citizens. The gravamen of a Fourth Amendment claim is that the complainant's legitimate expectation of privacy has been violated by an illegal search or seizure. *See, e.g., Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). In order to prevail, the complainant need prove only that the search or seizure was illegal and that it violated his reasonable expectation of privacy in the item or place at issue. *See, e.g., Rawlings v. Kentucky*, 448 U.S. 98, 104, 100 S.Ct. 2556, 2561, 65 L.Ed.2d 633 (1980).

The right to counsel is a fundamental right of criminal defendants; it assures the fairness, and thus the legitimacy, of our adversary process. *E.g., Gideon v. Wainwright*, 372 U.S. 335, 344, 83 S.Ct. 792, 796, 9 L.Ed.2d 799 (1963). The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect. *See, e.g., Strickland v. Washington*, 466 U.S. at 686, 104 S.Ct. at 2064; *United States v. Cronic*, 466 U.S. 648, 655-657, 104 S.Ct. 2039, 2044- 2046, 80 L.Ed.2d 657 (1984). In order to prevail, the defendant must show both that counsel's representation fell below an objective standard of reasonableness, *Strickland*, 466 U.S. at 688, 104 S.Ct. at 2064, and that there exists a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. at 694, 104 S.Ct. at 2068. Where defense counsel's failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness, the defendant must also prove that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice. Thus, while respondent's defaulted Fourth Amendment claim is one element of proof of his Sixth Amendment claim, the two claims have separate identities and reflect different constitutional values.

Kimmelman, 477 U.S. at 374-75, 106 S.Ct. 2574. In response to the state's concern that the ruling would strip the *Stone* restriction of practical effect, the Court noted:

> Although a meritorious Fourth Amendment issue is necessary to the success of a Sixth Amendment claim like respondent's, a good Fourth Amendment claim alone will not earn a prisoner federal habeas relief. Only those habeas petitioners who can prove under Strickland that they have been denied a fair trial by the gross incompetence of their attorneys will be granted the writ and will be entitled to retrial without the challenged evidence.

Id. at 382, 106 S.Ct. 2574.

Therefore, under *Kimmelman*, petitioner is entitled to raise a claim that he was denied effective assistance of counsel by his attorneys' failure to object to the admission of the handgun allegedly seized in violation of the Fourth Amendment. This claim will be discussed on the merits below. Petitioner's other claims are either defaulted or barred by Stone, or both. The court will nevertheless consider these claims on the merits as well, and finds in the alternative that none of them warrant relief.

3. Merits of the Claims.

i. The Bullet.

The petitioner's claim that the removal of the bullet rose to the level of a Fourth Amendment violation is without merit. With regard to this claim, the court finds the opinion

of the Alabama Court of Criminal Appeals to be a fair statement of the law to be applied and the facts surrounding petitioner's claim. In its opinion, the Alabama Court of Criminal Appeals stated:

> As required by Rule 45A, A.R.A.P., we have searched the record for any plain error or defect in the proceedings below, which may or may not have been brought to the attention of the trial court, which might adversely affect the substantial rights of the appellant. In doing so we discover that the appellant objected to the introduction of the bullet which was removed from his back.
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> The bullet was removed from appellant's back pursuant to a search warrant issued by the Circuit Court of Morgan County. Appellant, after the warrant was issued, petitioned this court for a writ of prohibition, which we denied in Ex parte *Johnson*, 452 So.2d 888 (Ala.Crim.App.1984). While the appellant did not raise it on appeal, we believe that we should address any effect of *Winston v. Lee*, 470 U.S. 753, 757, 105 S.Ct. 1611, 84 L.Ed.2d 662 (1985), upon our decision to allow the surgical removal of the bullet, as the direct consequence of that decision was the introduction of the bullet at trial.
>
> In *Winston*, a shopkeeper was wounded during an attempted robbery, but, being armed himself, was apparently able to wound his assailant in the left side before he fled. Lee was found eight blocks from the scene suffering from a gunshot wound to his left chest.

The Commonwealth of Virginia moved in state court for an order directing Lee to undergo surgery to remove the bullet, asserting that the bullet would provide evidence of Lee's guilt or innocence. As a result of expert testimony, which indicated that the surgery would require an incision of only 1/2 inch, and would be performed under local anesthesia without incurring the dangers of general anesthesia, the trial court granted the motion to compel Lee to undergo surgery. The Virginia Supreme Court, thereafter, denied Lee's petition for a writ of prohibition. Lee then attempted to have the operation enjoined by bringing an action, based on Fourth Amendment grounds, in the United States District Court for the Eastern District of Virginia. That court refused to issue an injunction.

Just prior to surgery, however, X-rays revealed that the bullet was, in fact, substantially deeper in Lee's chest than earlier believed, and the surgeon determined that general anesthesia would be needed. Lee moved for a rehearing, which was denied by the trial court, and that denial was affirmed by the Virginia Supreme Court. He then returned to the federal district court, which, after an evidentiary hearing, enjoined the surgery. The Court of Appeals for the Fourth Circuit affirmed, and the United States Supreme Court granted certiorari to consider whether a State could compel a suspect to undergo this type of surgery in a search for evidence of a crime.

The Supreme Court stated that "[t]he reasonableness of surgical intrusions beneath the skin depends on a case-by-case approach, in which the individual's interests in privacy and security are weighed against society's interests in conducting the procedure." The Supreme Court in discussing the risks associated with the surgical procedure noted that one surgeon had testified that due to the difficulty of discovering the exact location of the bullet, extensive probing and retracting of the muscle tissue could be required, which could lead to injury of the muscle, blood vessels, and nerves. The Court also noted medical testimony which indicated that the greater intrusion into the chest cavity *1377 and the larger incisions required would increase the risk of infection. The Court also addressed the fact that Lee would be required to undergo general anesthesia and found that "[t]his kind of surgery involves the total divestment of respondent's ordinary control over surgical probing beneath his skin."

In examining the other part of the balance, society's interest in conducting the procedure, the Court found that arguments of a compelling need for the bullet were not persuasive. The Court noted that the Commonwealth had available to it substantial additional evidence that Lee was the individual who accosted the shopkeeper on the night of the robbery. The Court went on to affirm the decision of the district court prohibiting the surgical removal of the bullet.

We believe that the instant case can be distinguished from Winston. Here, there was

> competent medical testimony which established that the bullet was lodged in fatty tissue, just beneath the skin, in the area of the shoulder blade; that surgery would be minor and would be performed with local anesthetic; and that practically no danger to life or health would be presented by the surgery. Due to the almost non-existent risk of danger to appellant as a result of the surgery and the potential value of the bullet to the State's case, we find that the appellant's interest in privacy and security did not outweigh society's interest in conducting the procedure. Therefore, we reaffirm our decision in *Ex parte Johnson*, supra, which permitted the surgical removal of the bullet, and we find that the bullet was properly introduced into evidence at trial.

Johnson v. State, 521 So.2d 1006, 1014-15 (Ala.Crim.App.1986). The petitioner's main concern with the analysis of the Court of Criminal Appeals is its characterization of the surgery as "minor." However, while the Supreme Court noted in Winston that "whether the surgery is to be characterized in medical terms as 'major' or 'minor' is not controlling," it also stated that "[t]his does not mean that the application of medical concepts in such cases is to be ignored." *Winston*, 470 U.S. at 764 n. 8, 105 S.Ct. 1611. The *Winston* Court enumerated three facts to be considered, including (1) the extent to which the procedure threatens the safety or health of the individual; (2) the extent to which the intrusion impinges upon the individual's "dignitary interests in personal privacy and bodily integrity;" and (3) the extent to which prohibiting the intrusion would affect the "community's interest in fairly and accurately determining guilt or innocence." *Id.* at 761-63, 105 S.Ct. 1611. The evidence presented indicated that the intrusion would not be

very deep and would require only a local anesthetic. There is no suggestion that the procedure had any likelihood of threatening the safety or health of the petitioner. In addition, despite Johnson's claims to the contrary, the State's need for the evidence was extremely strong, see id. at 762, 105 S.Ct. 1611; *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966); the bullet was by far the most persuasive piece of physical evidence linking Johnson to the crime scene. After consideration of the balancing factors enunciated in Schmerber and Winston, the court concludes that Johnson did not have a constitutional right to be free from the removal of the bullet lodged in his back, in a medically approved manner, pursuant to a warrant issued on probable cause. The search was, on balance, not unreasonable under the Fourth Amendment.

In summary, because the defendant had an opportunity to challenge the removal of the bullet from his back, and did so, *Stone v. Powell* precludes this court from directly considering a Fourth Amendment challenge to its removal on a federal habeas corpus proceeding. Neither trial nor appellate counsel were ineffective by reason of their handling of the Fourth Amendment issues in connection with the removal of the bullet. Alternatively, if the court were to reach the merits of this claim, it finds that the removal of the bullet comported *1378 with the requirements of the Fourth Amendment.

ii. The .357 Magnum Revolver.

As noted earlier, the petitioner's claim that the .357 magnum handgun was seized unlawfully can only be made indirectly, through a claim that his attorneys were ineffective because they did not object to the admission of the gun at trial. Since "a meritorious Fourth Amendment issue is necessary to the success of a Sixth Amendment claim,"

Kimmelman, 477 U.S. at 382, 106 S.Ct. 2574, the court will first discuss the underlying Fourth Amendment issue and then, only if necessary, address the merits of his ineffective assistance claim.

The Alabama Court of Criminal Appeals addressed Johnson's Fourth Amendment claim in the context of ineffective assistance of counsel as follows:

> Johnson claims that trial counsel were ineffective for not objecting on search and seizure grounds to the introduction into evidence of the .357 magnum pistol that was found in the motel room when Johnson was arrested.
>
> We hold that because the search of the motel room and seizure of the pistol were valid, the action of trial counsel in not objecting to the evidence could not have been ineffective assistance.
>
> First, Johnson does not have standing to raise this claim, because he did not have a legitimate expectation of privacy in the motel room. The motel room that was searched was not registered in Johnson's name, he had not rented it; that room had been rented by three other men before Johnson even arrived. One who does not have a legitimate expectation of privacy in the property or promises of another where evidence is found cannot litigate a Fourth Amendment claim. *Rawlings v. Kentucky*, 448 U.S. 98, 100 S.Ct. 2556, 65 L.Ed.2d 633 (1980). Hence, Johnson does not have a standing to adjudicate a claim involving the search of another's motel room.

Second, the search of the area under the mattress was reasonable under the probable cause coupled with exigent circumstances exception to the warrant requirement. Not only did the presence of marijuana in plain view in the motel room justify the search for more marijuana in the motel room, but the officers also had probable cause to believe that Johnson had been in an armed robbery that resulted in a shootout, that Johnson had been wounded in the back, and that Johnson had a pistol with him. The officers, moreover, observed that Johnson had in fact been wounded, and they noticed bloodstained linens on the bed near Johnson's clothing in the motel room.

Furthermore, the officers were confronted with an exigent circumstance--the danger that if the pistol was left in the motel room while the officers sought a warrant, one or more of the three other men who were in the motel room could have tampered with or removed the pistol. Hence, because the search and seizure of the pistol was justified, defense counsel did not render ineffective assistance of counsel in failing to object to the evidence on that ground. *See Love v. State*, 377 So.2d 8, 11-12 (Ala.Cr.App.1979) (pistol seized without warrant where officer had probable cause to believe defendant committed homicide and that there was a pistol in the residence where defendant was arrested). *See also Palmes v. Wainwright*, 725 F.2d 1511, 1523 (11th Cir.), *cert. denied*, 469 U.S. 873, 105 S.Ct. 227, 83 L.Ed.2d 156 (1984) ("[t]he Sixth Amendment right to effective assistance

> of counsel does not require counsel to raise every objection without regard to its merits").

Johnson, 612 So.2d at 1302.

In the court's view, this analysis suffers from certain factual and legal deficiencies. First, while it is axiomatic that one must have a "legitimate expectation of privacy" in the area searched in order to establish standing to challenge a search, *Rakas v. Illinois*, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978), the Supreme Court has specifically held that "a guest in *1379 a hotel room is entitled to constitutional protection against unreasonable searches and seizures." *Stoner v. California*, 376 U.S. 483, 490, 84 S.Ct. 889, 11 L.Ed.2d 856 (1964). Furthermore, although the right to exclude others may be an "important feature of a legitimate privacy expectation," *United States v. Brown*, 743 F.2d 1505, 1507 (11th Cir.1994), the Supreme Court has made clear that one need not own or have exclusive control over the property searched in order to contest a search of that property--especially, it seems, when one has a possessory interest in the object seized. In *Minnesota v. Olson*, 495 U.S. 91, 110 S.Ct. 1684, 109 L.Ed.2d 85 (1990), for example, the defendant had slept in the searched apartment for only one night and had never been left alone in the apartment. Nonetheless, the court found that Olson could state a legitimate objection, noting that an overnight guest "seeks shelter in another's home precisely because it provides him with privacy, a place where he and his possessions will not be disturbed by anyone but his host and those his host allows inside." *Id.* at 98, 110 S.Ct. 1684. In another case, the Court permitted a claim by a defendant who had a key to the searched apartment and could use it at will, despite the fact that he did not live in the apartment and it was rented and occupied by his relatives. *United States v. Jeffers*, 342 U.S. 48, 72 S.Ct. 93, 96 L.Ed. 59 (1951). In the present case,

although the hotel room searched was registered under other names, it appears from the evidence that Johnson had been there overnight, had slept on one of the beds in the room, and was a welcome guest of the men who had rented the room. The object seized, of course, belonged to the petitioner. Under these facts, the court believes that Johnson had a "legitimate expectation of privacy" in the hotel room. *See Rakas*, 439 U.S. at 143, 99 S.Ct. 421.

Second, it appears that, under the circumstances, the search itself may not have been justified under the exigent circumstances exception to the warrant requirement. A basic tenet of Fourth Amendment jurisprudence is that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 514, 19 L.Ed.2d 576 (1967). One of those exceptions, relied upon by the Alabama Court of Criminal Appeals, is commonly known as the "exigent circumstances" exception. When the police possess probable cause to conduct a search, but, because of exigent circumstances, do not have time to obtain a warrant, they may search without a warrant. *See, e.g., Roaden v. Kentucky*, 413 U.S. 496, 505, 93 S.Ct. 2796, 2802, 37 L.Ed.2d 757 (1973); *Chambers v. Maroney*, 399 U.S. 42, 46-52, 90 S.Ct. 1975, 1978-82, 26 L.Ed.2d 419 (1970). [FN56] The Alabama Court of Criminal Appeals correctly noted that the possibility of the removal of evidence by another can in some cases constitute an exigent circumstance which, coupled with probable cause, will justify a warrantless seizure. *See, e.g., Love v. State*, 377 So.2d 8, 11-12 (Ala.Crim.App.1979). The evidence in the case at bar, however, suggests that the exigent circumstance relied upon by the state court was simply unsupported by the facts. While neither party has addressed directly the status of the other three men present in

the hotel room at the time of Johnson's arrest, it appears that the men may well have been in the custody of the police. Two aspects of the record lead the court to this conclusion. First, the written statements of the other men in the room, as contained in the Alabama Bureau of Investigation report, are dated approximately one to one-and-a-half hours after Johnson's arrest and purport to have been taken at the Anniston Police Department. While certainly *1380 not dispositive, this raises an inference that the men were detained outside the motel room, transported to the Anniston Police Department, and questioned by the police. Second, and more significantly, Russell Lovell's written account of the events of March 14, 1984, contains this statement: "Wednesday night the police came in and took all of us to jail in Anniston." R20 at 985. It therefore appears that the three men may not have been in a position to dispose of any evidence left in the motel room while the police obtained a warrant, and no exigent circumstances for the warrantless search and seizure existed. Thus, while the court reaches no conclusive answer, it is clear that a direct challenge at trial to the search that yielded the pistol would have been far from frivolous.

FN56. Of course, the police must also possess probable cause for the search independent of the exigent circumstances. See *Swint v. Wadley*, 51 F.3d 988, 997 (11th Cir.1995). Here, the court has little doubt that probable cause to search the hotel room existed at the time of petitioner's arrest.

Nonetheless, the court finds that the search was valid under an alternative exception to the warrant requirement. In *Chimel v. United States*, 395 U.S. 752, 763, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1960), the Supreme Court held that, incident to a lawful arrest, the police may properly search the area

within the arrestee's "immediate control." This is true irrespective of whether under the circumstances it is likely that "weapons or evidence would in fact be found." *United States v. Robinson*, 414 U.S. 218, 235, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973). The police may also conduct a properly limited protective sweep incident to an arrest, so long as "the searching officer possesses a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene." *Maryland v. Buie*, 494 U.S. 325, 337, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990).

In the present case, the officers had a warrant for Johnson's arrest for a violation of probation and had a strong basis to believe that he had been involved in a robbery-murder involving one or more firearms a few days earlier. Johnson was in the hotel room with several other men at the time law enforcement officers knocked on the door and announced their presence. Though arrested outside, Johnson voluntarily re-entered the hotel room to retrieve his belongings. The police were certainly entitled to follow Johnson into room. *See Washington v. Chrisman*, 455 U.S. 1, 102 S.Ct. 812, 70 L.Ed.2d 778 (1982). Under the rule of Buie, the officers could also have examined the entire hotel room, and even the bathroom, for persons who presented a potential threat to their safety. Once Johnson had re-entered the hotel room and had access to areas within which a weapon might be hidden, the police were entitled to conduct a search of those areas. The fact that Johnson may have been handcuffed or even surrounded by officers by the time the search took place is irrelevant, since the area under the mattress was within his "immediate control" at the time of the arrest. *See generally New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981); *see also United States v. Abdul-Saboor*, 85 F.3d 664, 666 (D.C.Cir.1996); *Davis v. Robbs*, 794 F.2d 1129, 1130-31 (6th Cir.1986);

United States v. Cotton, 751 F.2d 1146, 1147- 48 (10th Cir.1985); *United States v. Silva*, 745 F.2d 840, 847 (4th Cir.1984); *United States v. Palumbo*, 735 F.2d 1095, 1096-97 (8th Cir.1984); *United States v. Hudson*, 100 F.3d 1409, 1419 (9th Cir.1996); *United States v. Mitchell*, 64 F.3d 1105, 1110 (7th Cir.1995). [FN57] Under these circumstances, the court is convinced that the police were justified in searching the hotel room incident to Johnson's arrest.

FN57. While the court could conceive of circumstances in which the search might not have been valid--for example, if the bed containing the handgun had been in an adjoining room or otherwise inaccessible to the petitioner--Johnson has not provided any factual evidence to suggest such circumstances.

Because Johnson has not established that his Fourth Amendment claim with regard to the .357 Magnum was meritorious, he can have no meritorious claim that his lawyers provided him ineffective assistance by their failure to make a Fourth Amendment challenge to use of that weapon *1381 at trial. The court may not, under *Stone v. Powell*, reach the merits of the search itself but if it were to do so, it would find the search that yielded the .357 Magnum pistol valid under the Fourth Amendment.

III. Conclusion.

For the foregoing reasons, the petition for habeas corpus will be DENIED. All the petitioner's claims are either procedurally defaulted, without merit, or both. A separate order will be entered denying all relief and dismissing the petition with prejudice.

Judgement

In accord with the Memorandum of Opinion entered contemporaneously herewith, it is hereby ORDERED, ADJUDGED, and DECREED:

1. The petition for the writ of habeas corpus is DENIED; and
2. Costs are taxed against the petitioner.

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APPENDIX C

Order

Supreme Court of Alabama

February 19, 1993

Ex parte Anthony Keith Johnson (Re: Johnson v. State)
1920371

SUPREME COURT OF ALABAMA

1993 Ala. LEXIS 303

February 19, 1993, Decided
PRIOR HISTORY: [*1] (CR 89-415)

OPINION: DENIED CERT, WITHOUT OPINION.

APPENDIX D

Opinion

Court of Criminal Appeals of Alabama

September 18, 1992

COURT OF CRIMINAL APPEALS OF ALABAMA.

Anthony Keith JOHNSON

Petitioner

v.

STATE, Respondents.

No. CR-89-415.

Sept. 18, 1992.

As Modified on Denial of Rehearing
Nov. 13. 1992.

Certiorari Denied Feb. 19, 1993
Alabama Supreme Court 1920371.

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*1291 John H. Schafer, Arvid E. Roach II, Debra Ann Palmer and Deborah K. Forbes, Washington, D.C., for appellant.

James H. Evans, Atty. Gen., and Ed Carnes, Asst. Atty. Gen., for appellee.

JAMES H. FAULKNER, Retired Justice.

This is an appeal from the denial of a petition for post-conviction relief filed pursuant to Rule 20, A.R.Cr.P.Temp.

The petitioner, Anthony Keith Johnson, was indicted for the capital offense of the murder of Kenneth Cantrell during the course of a robbery, in violation of § 13A-5-40, Code of Alabama 1975. Johnson was subsequently tried and found guilty as charged in the indictment. At the sentencing hearing, the jury recommended that Johnson be sentenced to life imprisonment without parole. The trial court overrode the jury's recommendation and on November 8, 1985, sentenced Johnson to death.

Johnson's conviction and death sentence were affirmed on direct appeal. *Johnson v. State*, 521 So.2d 1006 (Ala.Cr.App.1986), *aff'd*, 521 So.2d 1018 (Ala.), *cert. denied*, 488 U.S. 876, 109 S.Ct. 193, 102 L.Ed.2d 162 (1988).

The Rule 20 petition that led to this appeal was filed on April 4, 1989, and an answer to the petition was filed on April 19, 1989. An amendment to the petition was filed on November 9, 1989, and an answer to the amended petition was filed on November 19, 1989. The petition, as amended, was summarily denied on March 16, 1990, by Judge A.L. Hundley. In response to a joint motion of the parties, this court remanded the case on April 10, 1990, for further proceedings. On April 30, 1990, Judge Hundley recused himself from any further participation in the proceedings. Evidentiary hearings were conducted before Judge John Jolly on November 15, 1990, and on December 17, 1990. On March 12, 1991, another amendment to the petition was filed. Thereafter, an answer to the petition as amended was filed.

On May 23, 1991, Judge Jolly entered a one-paragraph order denying the Amended Rule 20 petition. On May 31, 1991, Johnson appealed from that order. On June 5, 1991, the parties filed a joint motion in this court, seeking a remand with instructions for the trial court to file specific findings of fact with regard to each material issue of fact in the case. On June 7, 1991, this court remanded the case to the trial court with directions that the trial court file written findings of fact in support of its order denying Johnson's petition, as required by Rule 20.9(d), A.R.Cr.P.Temp., and this court's order of April 10, 1990. On June 17, 1991, Judge John Jolly filed a more specific order dated June 14, 1991, which denied Johnson's Rule 20 petition. In that order, Judge Jolly found that of the 13 claims which Johnson asserts, 8 claims were procedurally barred and, alternatively, lacked merit and the remaining 5 claims, although not barred, lacked legal merit.

I. Procedurally Barred Claims

Rule 20.2(a)(3), A.R.Cr.P.Temp., provides: "A petitioner will not be given relief under this rule based upon any ground ... [w]hich could have been but was not raised at trial ..." except for claims that the court lacked jurisdiction.

Rule 20.2(a)(4), A.R.Cr.P.Temp., provides: "A petitioner will not be given relief under this rule upon any ground ... [w]hich was raised or addressed on appeal...."

Rule 20.2(a)(5), A.R.Cr.P.Temp., provides: "A petitioner will not be given relief under this rule based upon any ground ... [w]hich could have been but was not raised on appeal ..." except for claims that the court lacked jurisdiction.

These procedural default rules have been uniformly enforced by the courts of this state in capital cases. *Ex parte Singleton*, 548 So.2d 167, 169-71 (Ala.1989); *Ex parte Clisby*, 501 So.2d 483, 484 (Ala.1986); *Singleton v. State*, 587 So.2d 1117 (Ala.Cr.App.1991); *Hubbard v. State*, 584 So.2d 895 (Ala.Cr.App.1991); *Baldwin v. State*, 539 So.2d 1103, 1104-05 (Ala.Cr.App.1988), *1292 *cert. denied*, 493 U.S. 874, 110 S.Ct. 206, 107 L.Ed.2d 159 (1989).

Consistent with the trial court's findings, we hold that the following claims raised by *Johnson* in his amended petition are procedurally barred under Rules 20.2(a)(3) and 20.2(a)(5), A.R.Cr.P.Temp., because these claims could have been but were not raised either at trial or on direct appeal:

1) his claim that the jury was not charged on the lesser included offense of felony murder;
2) his claim that the jury did not receive proper instructions on reasonable doubt;
3) his claim that the court incorrectly failed to find the existence of statutory mitigating circumstances;
4) his claim that the pre-sentence report was inaccurate and prejudicial to petitioner;
5) his claim that the sentence was imposed on the basis of facts not in the record; and
6) his claim that the override of the jury's recommendation was unconstitutional.

On direct appeal, Johnson raised and this court addressed the issue of whether the "trial court erred in refusing his motions for judgment of acquittal on the grounds that there was no proof that he was in Morgan County, where the murder was committed, and no proof that the gun which he possessed at the time he was arrested was used in the shooting." *Johnson v. State*, 521 So.2d 1006, 1012 (Ala.Cr.App.1986), aff'd, 521 So.2d 1018 (Ala.), cert. denied, 488 U.S. 876, 109 S.Ct. 193, 102 L.Ed.2d 162 (1988).

In his Amended Rule 20 petition Johnson now claims that due process requires that his conviction be set aside because of an alleged insufficiency of proof.

We hold that to the extent that this claim constitutes the same insufficiency-of-evidence issue asserted on direct appeal, this claim is procedurally barred from review under Rule 20.2(a)(4), A.R.Cr.P.Temp., because it was raised or addressed on appeal. We likewise hold that to the extent that this claim differs from the insufficiency of evidence issue asserted on direct appeal, this claim is procedurally barred from review under Rule 20.2(a)(5), A.R.Cr.P.Temp., because it could have been but was not raised on appeal.

On direct appeal, this court addressed sua sponte the issue of whether the surgical procedure performed on Johnson, pursuant to a search warrant to remove a bullet from his back, constituted an unconstitutional search and held that it did not. *Johnson v. State*, *supra*, 521 So.2d at 1014-15.

In his Amended Rule 20 petition Johnson now claims that he was convicted of a capital offense based on evidence seized as a result of searches conducted in violation of the United States and Alabama Constitutions. Johnson argues in particular that 1) the seizure of the revolver from under the mattress in a motel room occupied by Johnson resulted from an unconstitutional search; 2) the surgical procedure performed on his body constituted an unconstitutional search; and 3) the admission of this illegally obtained evidence at trial prejudiced him.

We hold that the claim involving the seizure of the revolver is procedurally barred under Rule 20.2(a)(3) and

20.2(a)(5), A.R.Cr.P.Temp., because this claim could have been but was not raised at trial or on direct appeal. We likewise hold that Johnson's search and seizure claim involving the bullet that was removed from his back is procedurally barred under Rule 20.2(a)(4), A.R.Cr.P.Temp., because it was addressed and rejected on the merits on direct appeal.

II. The *Brady v. Maryland* Claim

Johnson contends that the State failed to produce exculpatory information in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). In particular, Johnson argues that although his trial counsel filed a discovery motion that requested, among other things, all information favorable to the defense, the state did not produce or disclose 1) documentary evidence, including an investigatory report of the crime prepared by the Alabama Bureau of Investigation ("ABI Report"), that the state was investigating two other suspects *1293 in connection with the Cantrell homicide; 2) statements of some persons present in the motel room when Johnson was arrested, which statements allegedly contradicted the statement of David Lindsey, which implicated Johnson in the Cantrell homicide; and 3) the short synopsis of the lengthy ABI report, which indicated that the victim, Kenneth Cantrell, fired at the robbers before they fired at him.

"A *Brady* violation occurs where: 1) the prosecution suppressed evidence; 2) the evidence was favorable to the defendant; and 3) the evidence was material to the issues at trial." *Stano v. Dugger*, 901 F.2d 898, 899 (11th Cir.1990).

A. The "Other Suspects" Information

We hold that the prosecutor's failure to disclose the "other suspects" information contained in the ABI report and the police file did not violate *Brady v. Maryland* for the following reasons.

First, the fact that there were other suspects was not necessarily exculpatory evidence because an eyewitness, the victim's wife, testified that two robbers entered the house and fired shots inside it. Hence, the fact that law enforcement officials were looking for the other person or persons who acted in concert with Johnson in perpetrating the attempted robbery and homicide in no way exculpates Johnson.

Secondly, the "other suspects" information was not suppressed. Johnson's trial counsel both testified that they knew before trial that there were other suspects in the case and that Sergeant Newell of the ABI had specifically informed them before trial that there were other suspects. Hence, because Johnson's trial counsel had independent knowledge of the "other suspects" information, the "other suspects" information contained in the ABI report and police files cannot be said to have been suppressed.

Finally, even if, arguendo, the "other suspects" information had been favorable to Johnson and even if, arguendo, the defense had not known this information prior to trial, the "other suspects" information is still not material to the issues at trial.

"The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *United*

States v. Bagley, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481 (1985).

In *Hendrix v. State*, 589 So.2d 769 (Ala.Cr.App.1991), we held that even if the prosecution had suppressed evidence concerning six other suspects, the defendant would not be entitled to any relief because there was no reasonable probability that if the evidence of the other suspects had been disclosed the result of the proceeding would have been different.

Under Alabama law, moreover, "other suspect" information is not admissible. "It is recognized that an accused is not entitled to prove, without more, that another has been suspected of committing the crime for which the accused is being tried." C. Gamble, McElroy's Alabama Evidence § 48.01(9) (4th ed. 1991). Most recently, in *Tomlin v. State*, 591 So.2d 550, 558 (Ala.Cr.App.1991), this court stated that "[t]he general rule in Alabama is that an accused is not entitled to introduce testimony that someone else was suspected of committing the crime for which he is being tried."

Applying these principles to this case, there is no reasonable probability that, had the ABI report and police files been disclosed to the defense, the result of the proceedings would have been different. Johnson has not established that anything in the ABI report or police files concerning "other suspects" would have been admissible at trial. Even if the information were admissible, that information could have merely confirmed that Johnson did not act alone, as corroborated by the testimony of the victim's wife, who was an eyewitness to the homicide.

Johnson, moreover, has offered absolutely no evidence that disclosure of the "other suspects" information might, to a reasonable probability, have changed the outcome of the proceeding. For example, Johnson *1294 did not present the alleged informant at the hearing on his Amended Rule 20 petition, nor did he make any apparent attempt to determine the identity of that informant for the purpose of establishing that the informant's tip was exculpatory and material.

Hence, the trial court properly ruled that the prosecutor's failure to disclose the "other suspects" information contained in the ABI report and police files did not violate *Brady v. Maryland.*

B. The Statements of Persons Present in the Motel Room

We hold that the prosecutor's failure to disclose the statements and/or summaries of the statements of Tommy Rudd, Gene Loyd, Russell Lovell, and Jay Robertson did not violate *Brady v. Maryland.*

First, there has been no showing that this information was not available to the defense at the time of the trial. There is no Brady violation where the information in question could have been obtained by the defense through its own efforts. *May v. Collins*, 904 F.2d 228, 231 (5th Cir.1990), *cert. denied*, 502 U.S. 1046, 112 S.Ct. 907, 116 L.Ed.2d 808 (1992).

Second, the information in question is not exculpatory. The statements of the four men are not clearly contradictory of David Lindsey's testimony. Nothing in the two statements of Rudd contradicts Lindsey's trial testimony. Nothing in Loyd's statement contradicts Lindsey's trial

testimony--because of Loyd's admittedly intoxicated state on Tuesday, March 13, 1984, Loyd could neither confirm nor deny whether Johnson discussed the events surrounding his gunshot wound at that time. Assuming that the summary of Lovell's statement is accurate, Lovell's statement does not contradict Lindsey's trial testimony. Lovell said only that he never heard Johnson say anything about being shot "during the time the four of us were at the motel." The summary of Lovell's statement makes it clear that "the four of us" were Johnson, Lovell, Loyd, and Roberson. The Lovell summary does not say anything about what was said or not said when Lindsey was there. Finally, the summary of Roberson's statement, if accurate, does not say anything about what was said or not said when Lindsey was present in the motel room.

Third, the information in question is not material because Johnson has failed to carry his burden of showing that if the information had been disclosed to the defense, the outcome of the trial probably would have been different. *United States v. Bagley, supra*, 473 U.S. at 682, 105 S.Ct. at 3383. The out-of-court statements and summaries are not admissible in evidence, and Johnson has not proven how the four men would have testified that they had been called to the stand and placed under oath. Johnson did not produce any of the four men as a witness at the evidentiary hearing in this proceeding, and this court is left with no sworn testimony at all as to what any of them would have actually said had they been called as witnesses at trial. Moreover, even if it could be assumed that each of the four men would have testified exactly as indicated in their statements or the summaries of their statements, Johnson has not shown that this hypothetical testimony would have produced a different result in the trial.

Hence, the trial court properly ruled that the prosecutor's failure to disclose the statements and/or

summaries of the statements of Rudd, Loyd, Lovell, and Robertson did not violate *Brady v. Maryland*.

C. The Synopsis of the ABI Report

In the 10-sentence synopsis of the lengthy ABI report, the following statement appears: "The victim fired six rounds at the [two] subjects, possibly hitting one subject. The subjects returned fire, striking the victim in the upper part of the body four times. A fifth shot struck the victim on the right hand." This synopsis was not given to the defense.

We hold that the prosecutor's failure to disclose the synopsis of the ABI report did not violate Brady v. Maryland for the following reasons:

The statement in question is clearly a misinterpretation of the contents of the ABI report. The only eyewitness whose statement is summarized in the report is the widow, Mrs. Nell Cantrell. Her statement, *1295 which was not taken by the author of the synopsis, simply does not say, or even imply, that the victim started shooting first. An officer's erroneous out-of-court interpretation of a witness's statement, especially one that the officer did not take, is not admissible evidence. Hence, the statement in question, which has no basis in fact and is a misinterpretation of the contents of the ABI report, is clearly not exculpatory.

In addition, it is immaterial whether the robbery victim or the robbers started shooting first because a robber has absolutely no legal right to kill a robbery victim who is attempting to defend himself or his property. In *Hopper v. Evans*, 456 U.S. 605, 613, 102 S.Ct. 2049, 2054, 72 L.Ed.2d 367 (1982), the Supreme Court held that it would be "an extraordinary perversion of the law" to say that intent to kill

is not established when a robber shoots the robbery victim to prevent the victim from harming the robber. Because it is legally immaterial whether Johnson and his fellow robber or their victim fired first, any information indicating that the victim may have fired first is neither exculpatory nor material under Brady and Bagley.

Hence, because there is no reasonable probability that disclosure of the erroneous statement in the synopsis would have produced a different result, the trial court properly ruled that the prosecutor's failure to disclose the synopsis did not violate Brady v. Maryland.

III. Ineffective-Assistance-of-Counsel Claims

Johnson contends that he was denied effective assistance of both his trial and appellate counsel at the guilt and sentencing stages of his trial.

In *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984), the Supreme Court held that there were two necessary components of an ineffective-assistance-of-counsel claim:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that counsel's deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a

> defendant makes both showings, it cannot be said that the conviction resulted from a breakdown in the adversary process that renders the result unreliable.

With regard to the performance component of an ineffective assistance of counsel claim, the Supreme Court in *Strickland, supra*, held:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. *Cf. Engle v. Isaac*, 456 U.S. 107, 133-134 [102 S.Ct. 1558, 1574-75, 71 L.Ed.2d 783] (1982). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' *See Michel v. Louisiana, supra* [350 U.S. 91], at 101 [76 S.Ct. 158, 164, 100 L.Ed. 83]. There are countless ways to provide effective

> assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way."

466 U.S. at 689-90, 104 S.Ct. at 2065.

The Supreme Court in *Strickland*, moreover, reiterated that "[i]t is not enough for the defendant to show that the errors had *1296 some conceivable effect on the outcome of the proceedings ...", because "[v]irtually every act or omission of counsel would meet that test...." 466 U.S. at 693, 104 S.Ct. at 2067.

More specifically, the Supreme Court held in *Strickland* as follows:

> "When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt. When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer--including an appellate court, to the extent it independently reweighs the evidence--would have concluded that the balance of aggravating and mitigating circumstances did not warrant death."

466 U.S. at 695, 104 S.Ct. at 2068-69.

We shall not subject each of Johnson's ineffective-assistance-of-counsel claims to the bipartite calculus articulated in *Strickland v. Washington*, supra.

A. Ineffective Assistance of Trial Counsel During Guilt Phase

Johnson contends that trial counsel Joseph W. Propst II and Thomas M. DiGiulian mistakenly believed that the felony murder doctrine could eliminate the need to prove the intent to kill that is necessary for a capital murder conviction and that this total misunderstanding of the law led to other fundamental errors resulting in Johnson's conviction and death sentence. In particular, Johnson argues that this total misunderstanding of the law led trial counsel to believe that Johnson's only available defense was that Johnson was not present at the Cantrell home on March 11, 1984.

"Aided by the magnifying glass of hindsight and armed with information obtained and legal cases decided after his conviction," Johnson's present counsel posit that according to Mrs. Cantrell's trial testimony, Johnson was one of three men who came to the Cantrell home on March 11, 1984, to perpetrate a robbery; that only the two men accompanying Johnson entered the Cantrell residence and fired shots at the victim; and that Johnson merely stood outside the carport door and was wounded by a bullet fired by the victim, which travelled through a glass pane on the carport door and entered Johnson's back. *Bell v. State*, 518 So.2d 840 (Ala.Cr.App.1987), *cert. denied*, 486 U.S. 1036, 108 S.Ct. 2024, 100 L.Ed.2d 611 (1988).

1. Under this new scenario, Johnson claims that trial counsel were ineffective for failing to argue that although Johnson was a participant in the robbery, he did not participate in the murder and he did not have the requisite intent to kill.

The record reveals that as part of their pre-trial preparation, defense counsel talked with some potential witnesses, and they talked a great deal and continuously with Johnson. According to defense counsel, Johnson told them "the whole story," and their defense theory was based upon what Johnson told them. The defense theory was that Johnson was not present and was not involved in the crime at all.

Defense counsel made a reasoned, strategic decision not to argue inconsistent, alternative theories of defense--such as that Johnson was not present at the crime scene and alternatively that Johnson was present but did not intend that the victim be killed. That strategic decision not to argue inconsistent theories was based upon defense counsel's judgment that, as a practical matter, there was little or no chance the jury would fail to find that Johnson had the intent to kill if the jury concluded that he had been at the scene. Trial counsel knew at the time they made their strategic decision that deliberation and premeditation were not required under Alabama law, and that it was irrelevant whether Johnson had the intent to kill before he went into the house and the shooting began. See Commentary to § 13A-6-2, Code of Alabama 1975 (recognizing that any distinctions based upon deliberation and premeditation have been eliminated from the definition of murder). Trial counsel also knew that if Johnson had the requisite intent to kill, Johnson could be guilty of the capital offense even though he was not the actual triggerman. **1297Section 13A-5-40(c), Code of Alabama 1975; Ex* parte Raines, 429 So.2d 1111, 1112-13 (Ala.1982), *cert. denied*, 460 U.S. 1103, 103 S.Ct. 1804, 76 L.Ed.2d 368 (1983).

Finally, because of Johnson's adamant refusal to testify, trial counsel were unable to present any evidence that Johnson was present at the scene and involved in the crime

but that he lacked the requisite intent to kill. Moreover, the eyewitness, Mrs. Cantrell, never testified at trial that there were three perpetrators--her testimony clearly states that two men forced their way into her house and that both men fired shots at her husband. As a result, there was no reasonable basis in the evidence for an argument that Johnson was present and involved in the robbery but did not participate in the shooting and lacked the requisite intent to kill.

We, therefore, hold that defense counsels' reasoned, strategic decision was not outside "the wide range of reasonable professional assistance." *Strickland v. Washington, supra*, 466 U.S. at 689, 104 S.Ct. at 2065. In addition, Johnson has not established a reasonable probability that if trial counsel had argued that he was present but did not participate in the shooting and that he lacked the intent to kill, the result of the trial would have been different. Hence, the trial court properly denied Johnson's claim of ineffective assistance on this ground.

2. Johnson claims that his trial counsel were ineffective because they failed to object to the trial court's instructing the jury on capital murder and on the aiding and abetting doctrine as applied to capital murder cases.

Trial counsel insisted that the trial court instruct the jury that Johnson could not be convicted of the capital offense unless he had the requisite intent to kill, and the court gave that instruction to the jury.

The instructions that the court gave the jury on the elements of the capital offense and on the aiding and abetting doctrine as it applies to capital murder cases followed the pattern jury instructions promulgated by the Alabama Supreme Court, and those instructions were correct. *See*

Proposed Pattern Jury Instructions for use in the Guilt Stage of Capital Cases Tried Under Act. No. 81-178 (approved Dec. 6, 1982), 2-5, 13-16.

There was an evidentiary basis for the capital murder charge and for the aiding and abetting instruction. As a result, there was no valid basis to object to those instructions.

There was no basis to object to the aiding and abetting or complicity instructions on the ground that the indictment did not expressly or separately charge Johnson with complicity or with aiding and abetting. Under Alabama law, the distinction between principals and accessories has long been abolished; one charged as a principal may be convicted as an accomplice, and the State is not required to notify the defendant in the indictment or otherwise that it is proceeding under a complicity theory. *Hyter v. State*, 545 So.2d 194, 197 (Ala.Cr.App.1989); *Wallace v. State*, 530 So.2d 849, 855- 56 (Ala.Cr.App.1987), *cert. denied*, 530 So.2d 861 (Ala.1988).

Trial counsel's not objecting to the court's action in submitting capital murder and complicity charges to the jury was not outside "the wide range of reasonable professional assistance." *Strickland v. Washington*, *supra*, 466 U.S. at 689, 104 S.Ct. at 2065. In addition, Johnson has failed to demonstrate a reasonable probability that if counsel had objected, the result of the trial would have been different. Hence, the trial court properly denied Johnson's claim of ineffective assistance of counsel on this ground.

3. Johnson claims that his trial counsel were ineffective because they failed to ask the trial court to instruct the jury on felony murder as a lesser included offense.

Trial counsel filed 21 written requests for jury instructions at the guilt stage, and 18 of those requested instructions were given. The trial court instructed the jury on the lesser included offenses of intentional murder and robbery, and it submitted verdict options to the jury on those lesser offenses. The court did not instruct the jury on felony murder as a lesser included *1298 offense or submit a felony murder verdict option to the jury. No felony murder instruction or verdict option was requested by trial counsel.

Trial counsel was aware that intent to kill was a required element of the capital offense and insisted that the court instruct the jury that Johnson could not be convicted of a capital offense unless he had the requisite intent to kill, and the court gave that instruction to the jury. However, trial counsel was also aware that under Alabama law Johnson could be convicted of the intentional killing component of the capital murder even if he was not the triggerman who actually killed the victim. § 13A-5-40(C), Code of Alabama 1975. Trial counsel, furthermore, could not present any evidence that Johnson was present at the scene but that he lacked the intent to kill because Johnson adamantly refused to testify.

Not requesting a felony murder instruction was consistent with the theory of defense, which was that Johnson was not present at and was not involved in the crime. That defense theory was based upon what Johnson had told defense counsel. As the Supreme Court has held: "[T]he reasonableness of counsels' actions may be determined or substantially influenced by the defendant's own statements or actions." *Strickland v. Washington, supra,* 466 U.S. at 691, 104 S.Ct. at 2066.

In addition, there was simply no basis for a felony murder instruction in view of the evidence in this case. There was no reasonable basis in the evidence from which the jury could conclude beyond a reasonable doubt that Johnson was guilty of robbery during which a killing occurred and at the same time have a reasonable doubt as to whether Johnson had the necessary intent to kill. The testimony of eyewitness Nell Cantrell was that two men forced their way into her home and that both men fired shots at her husband. While the shots of the second "masked" robber were not the shots that killed the victim, there was no reasonable basis for the jury to doubt that the second robber had the intent to kill, attempted to kill, and actively participated in the killing. The factual issue was whether Johnson was the second robber, i.e., whether Johnson was not present at the scene and was not involved in any way. The defense was that Johnson was not the second robber and that Johnson was neither present nor involved in any way. Under the evidence, Johnson was either the second robber in the house who fired the shots at the victim or he was not involved in the crime at all. Therefore, Johnson was either guilty of capital murder or of nothing at all; no felony murder instruction was supported by the evidence, and none should have been given.

In view of the defense theory and the evidence that was presented at trial, Johnson has not established that defense counsel's failure to ask for an instruction regarding felony murder as a lesser included offense placed their professional performance outside the "wide range of reasonable professional assistance." *Strickland v. Washington, supra*, 466 U.S. at 689, 104 S.Ct. at 2065.

Even if we assume, arguendo, that failure to request a felony murder instruction constitutes ineffective assistance, Johnson has failed to establish the prejudice component that

Strickland requires. Johnson has not proven by "a reasonable probability" that if counsel had requested a felony murder instruction, the result of the proceeding would have been different. Because such an instruction was not required under the evidence and because the jury would not have returned a verdict on felony murder absent an evidentiary basis for such a verdict, requesting such an instruction would not have changed the outcome of the trial. Hence, the trial court properly denied Johnson's claim of ineffective assistance of counsel on this ground.

4. Johnson claims that three sentences of trial counsel's closing argument affirmatively stated to the jury that proof of felony murder would support a capital murder conviction.

Defense attorney DiGiulian delivered an effective closing argument that covers 55 legal-size pages of the record. In one three-sentence part of that lengthy argument, he stated:

> *1299 "You are going to have to go back there, and you are going to have to find, in order to convict and find Keith guilty, you are going to have to find that the State has proved an intentional killing occurred, a forcible robbery or intent to rob, and going to have to find that Keith was one of the men that was out there. That is what you are going to have to do in order to find each and every one of those beyond a reasonable doubt and to a moral certainty. Each one of you is going to have to do that."

Neither in that passage nor in any other part of his closing argument did Mr. DiGiulian affirmatively state to the

jury that it was not necessary for the state to prove that Johnson had the intent to kill.

Shortly before Mr. DiGiulian made the remark in question, the trial judge, after reminding the jury that he had told them that opening statements do not constitute the law, instructed them that closing arguments "fall in the same category." After the closing arguments, the trial judge instructed the jury that it was the judge's duty to decide and define the law for the jury. While defining the law to the jury, the trial court repeatedly and emphatically instructed the jury that a necessary element of the capital offense was that the defendant had committed an intentional killing or had intentionally aided and abetted an intentional killing, and that the jury could not convict the defendant unless it was convinced beyond a reasonable doubt of that necessary element. The law presumes that jurors follow their instructions. *Parker v. Randolph*, 442 U.S. 62, 73, 99 S.Ct. 2132, 2139, 60 L.Ed.2d 713 (1979).

The record reveals that Mr. DiGiulian understood that there had to be evidence of Johnson's participation in the actual murder in order for Johnson to be convicted of the capital offense. Furthermore, before closing argument, defense counsel submitted to the judge a three-paragraph written requested instruction that emphasized and detailed the burden on the state to prove beyond a reasonable doubt that Johnson was guilty of an intentional killing before he could be convicted of the capital offense. The judge gave that jury instruction verbatim.

Mr. DiGiulian's closing argument was made pursuant to the defense theory that Johnson was not present at the scene of the crime and was not in any way involved in it.

Contrary to Johnson's assertions, Mr. DiGiulian did not affirmatively state to the jury that it was not necessary for the state to prove that he had the intent to kill. Instead, Mr. DiGiulian was stressing to the jury those elements of the capital offense that the defense theory of the case had focused upon. The Eleventh Circuit Court of Appeals has noted that special deference is due to an attorney's closing argument strategy because it is "an inherently subjective task." *Thompson v. Wainwright*, 787 F.2d 1447, 1455 (11th Cir. 1986), *cert. denied*, 481 U.S. 1042, 107 S.Ct. 1986, 95 L.Ed.2d 825 (1987).

Therefore, given the theory of the defense, Johnson has failed to establish that the three sentences of Mr. DiGiulian's closing argument that are in question constituted an unprofessional error outside the "wide range of reasonable professional assistance." *Strickland v. Washington*, *supra*, 466 U.S. at 689, 104 S.Ct. at 2065. Moreover, there is no reasonable probability that, if Mr. DiGiulian had not uttered those three sentences, the result of the trial would have been different.

5. Johnson claims that his trial counsel were ineffective for failing to object to one passage of the prosecutor's closing argument at the guilt stage.

In his closing argument, the prosecutor made the following statements:

> "[I]f these two men went in, and if they went in there to rob this dear lady and her husband, the act of one is the act of both, the act of one is the act of all, and what one does the other is responsible for.... When those two men busted through that door out there that night, everything that each of them did, the other

> was responsible for under the law of the State of Alabama, and one is just as equally guilty for the death of this man as the other."

Defense counsel did not object to this portion of the prosecutor's closing argument.

Before closing argument, the trial court had reminded the jury that closing arguments, like opening statements, do not constitute the law. After the closing arguments, the trial court instructed the jury that it was the court's duty to decide and define the law for the jury--this instruction was given at the request of defense counsel. The court also gave a full and accurate complicity instruction that corrected what the prosecutor had said. The court's instructions on complicity followed the Alabama Supreme Court's pattern instruction on that subject. The court also gave, at the request of defense counsel, an instruction cautioning the jury that what the attorneys had said was not evidence.

Because the prosecutor's misstatements were not material to the theory of defense, defense counsel's failure to object to that argument was not outside "the wide range of reasonable professional assistance." *Strickland v. Washington*, *supra*, 466 U.S. at 689, 104 S.Ct. at 2065. Because, moreover, the court issued a curative instruction to the jury, Johnson has also failed to establish a reasonable probability that if that counsel had objected to the prosecutorial argument, the result of the trial would have been different. *See Shriner v. Wainwright*, 715 F.2d 1452, 1459 (11th Cir.1983), *cert. denied*, 465 U.S. 1051, 104 S.Ct. 1328, 79 L.Ed.2d 723 (11th Cir.1984), ("with a properly instructed jury, there is nothing to show the jury relied on the prosecutor's remarks").

6. Johnson claims that counsel rendered ineffective assistance of counsel in their cross-examination of David Lindsey.

Defense counsel demanded a preliminary hearing for discovery purposes to cross-examine prosecution witnesses before trial. One of those witnesses was David Lindsey. Defense counsel reviewed that prelimin y hearing transcript, including Lindsey's testimony, in detail before trial. They also interviewed the officer in charge of the investigation several times, and they talked a great deal with Johnson about the facts of the case. Their conduct of the defense was based upon what Johnson told them, and Johnson told them "the whole story." In addition to all those efforts, defense counsel employed an investigator to help them find any useful impeachment information about Lindsey. That investigator worked on the case for more than nine weeks.

Defense counsel effectively cross-examined David Lindsey. Defense counsel brought out a contradiction between Lindsey's trial testimony and the testimony that he had given at the preliminary hearing. Defense counsel suggested that Lindsey was biased against Johnson because Johnson and Lindsey's wife had had an affair. Trial counsel forced Lindsey to admit that he had been convicted of illegal possession of controlled substances, specifically metamphetamines, and that Lindsey shot the drug into his arms. As defense counsel argued to the jury, "Mr. Lindsey was a man who mainlined speed, shot it up his arm."

While Johnson's present counsel makes it clear that he would have followed a different strategy in cross-examining Lindsey, that is not the test for ineffective assistance of counsel. "There are countless ways to prove effective assistance in any given case. Even the best

criminal defense attorneys would not defend a particular client in the same way." *Strickland v. Washington, supra,* 466 U.S. at 689, 104 S.Ct. at 2065.

Moreover, Johnson has not even proven an evidentiary basis for his alternative strategy. Johnson has not shown that any additional information in the investigator's report would have been useful in impeachment, or even admissible. Johnson did not offer as witnesses at the evidentiary hearing any of the four men who were present at the motel and who he now hopes could have impeached Lindsey's testimony. Absent a showing that real impeachment evidence was available and could have been put forward at trial, Johnson has not shown that it would have made any difference at all to cross-examine Lindsey concerning those statements. Finally, the deposition of Lindsey by Johnson's present counsel does not establish that their latest cross- examination strategy would have been any more effective than the cross- *1301 examination of Lindsey that actually occurred.

Therefore, Johnson has failed to show that trial counsel's cross-examination of Lindsey was outside "the wide range of reasonable professional assistance," or that there is a reasonable probability that if counsel had used a different cross-examination strategy, the trial would have ended differently. *Strickland v. Washington, supra,* 466 U.S. at 689, 104 S.Ct. at 2065.

7. Johnson claims that trial counsel were ineffective for not making a different objection to statistical evidence concerning the glass fragments that were found on the bullet removed from Johnson's body.

During the examination of the forensic expert who testified that the glass fragments found on the bullet removed from Johnson's back had exactly the same refractive indexes as the glass in the door pane through which Mr. Cantrell had fired at the robber, the following occurred:

> "THE COURT: Does your science provide you any judgment as to the mathematical probabilities of these two comparisons as to indicate them from being from the same source or not?
>
> "THE WITNESS: There has been some statistics that have been done and accumulated from the F.B.I. that I am familiar with.
>
> "THE COURT: What is the mathematical probability?
>
> "MR. PROPST: Judge, his knowledge of that is contained through hearsay.
>
> "THE COURT: No, sir, he is an expert witness. Go ahead.
>
> "THE WITNESS: The data that has been accumulated by the Federal Bureau of Investigation that they have found the same physical properties in three point eight percent of their glass samples that they have examined.
>
> "THE COURT: What does that mean? Can you--can you explain it any more? I don't know that I understand that exactly. Maybe the jury does. I don't believe I do.
>
> "THE WITNESS: From a statistical standpoint, utilizing the F.B.I., four out of one hundred samples could have the same physical properties.

"THE COURT: Four out of one hundred?

"THE WITNESS: Yes, sir.

"THE COURT: All right. Thank you."

Johnson contends that this excerpt reveals that the state's forensic expert was permitted to testify that there was a 96% probability that the bullet that struck Johnson passed through the Cantrells's carport door, and that defense counsel rendered ineffective assistance by objecting on hearsay rather than on lack of foundation grounds. We disagree.

Contrary to Johnson's claim, the forensic expert did not testify that there was a 96% probability that the glass embedded in the bullet removed from Johnson's back matched the glass from the glass pane in the victim's door. Instead, he confined his testimony about probabilities to the F.B.I. samples, and he testified that if one utilized the F.B.I. samples, then four out of 100 samples could have the same physical properties as the glass in this case. The forensic expert did not testify that the F.B.I. samples were representative of glass in North Alabama or in the county as a whole, and he expressly stated that he could not say that the glass fragments from the bullet removed from Johnson's back came from the Cantrells's door pane.

Furthermore, even if the testimony was as Johnson construes it, the failure of trial counsel to make a foundation objection does not rise to the level of ineffective assistance of counsel. Not only was the failure to object on that specific ground not outside "the wide range of reasonable professional assistance," but Johnson has also failed to make the required showing of prejudice. *Strickland v. Washington*, *supra*, 466 U.S. at 689, 104 S.Ct. at 2065.

Even without the probability statement, the properly admitted evidence concerning the refractive indexes of the glass was very specific and probative. Moreover, given the position of the victim at the time of the gunfight (sitting on a couch in the living room) and the height of the bullet wound in Johnson's back as compared with *1302 the height of the bullet hole in the glass pane of the carport door at the victim's house, the jury could reasonably conclude that the bullet which was removed from Johnson's back was fired by the victim. This conclusion is bolstered by the fact that the bullet removed from Johnson's back was also of the same caliber, had been made by the same manufacturer, and had the same number of lands and grooves as other bullets fired from the pistol used by the victim.

Finally, Johnson has not even suggested any alternative explanation for how he came to have a bullet with all those similarities to other bullets fired from the victim's pistol lodged in his back shortly after the exchange of gunfire took place. Therefore, in light of this overwhelming independent evidence linking the bullet removed from Johnson's back to the bullet that Cantrell fired at the second robber, there certainly is not a reasonable probability that if trial counsel had made a different objection to the probability evidence, the result of the trial would have been different. Hence, the trial court properly denied Johnson's claim of ineffective assistance of counsel on this ground.

8. Johnson claims that trial counsel were ineffective for not objecting on search and seizure grounds to the introduction into evidence of the .357 magnum pistol that was found in the motel room when Johnson was arrested.

We hold that because the search of the motel room and seizure of the pistol were valid, the action of trial counsel

in not objecting to the evidence could not have been ineffective assistance.

First, Johnson does not have standing to raise this claim, because he did not have a legitimate expectation of privacy in the motel room. The motel room that was searched was not registered in Johnson's name, he had not rented it; that room had been rented by three other men before Johnson even arrived. One who does not have a legitimate expectation of privacy in the property or premises of another where evidence is found cannot litigate a Fourth Amendment claim. *Rawlings v. Kentucky*, 448 U.S. 98, 100 S.Ct. 2556, 65 L.Ed.2d 633 (1980). Hence, Johnson does not have a standing to adjudicate a claim involving the search of another's motel room.

Second, the search of the area under the mattress was reasonable under the probable cause coupled with exigent circumstances exception to the warrant requirement. Not only did the presence of marijuana in plain view in the motel room justify the search for more marijuana in the motel room, but the officers also had probable cause to believe that Johnson had been in an armed robbery that resulted in a shootout, that Johnson had been wounded in the back, and that Johnson had a pistol with him. The officers, moreover, observed that Johnson had in fact been wounded, and they noticed bloodstained linens on the bed near Johnson's clothing in the motel room.

Furthermore, the officers were confronted with an exigent circumstance--the danger that if the pistol was left in the motel room while the officers sought a warrant, one or more of the three other men who were in the motel room could have tampered with or removed the pistol. Hence, because the search and seizure of the pistol was justified,

defense counsel did not render ineffective assistance of counsel in failing to object to the evidence on that ground. *See Love v. State*, 377 So.2d 8, 11-12 (Ala.Cr.App.1979) (pistol seized without warrant where officer had probable cause to believe defendant committed homicide and that there was a pistol in the residence where defendant was arrested). *See also Palmes v. Wainwright*, 725 F.2d 1511, 1523 (11th Cir.), *cert. denied*, 469 U.S. 873, 105 S.Ct. 227, 83 L.Ed.2d 156 (1984) ("[t]he Sixth Amendment right to effective assistance of counsel does not require counsel to raise every objection without regard to its merits").

B. Ineffective Assistance of Appellate Counsel During Guilt Phase

Johnson claims that attorney John Mays, who was appointed to represent Johnson on his direct appeal, rendered ineffective assistance by, he says, omitting key facts from the statement of facts, omitting *1303 crucial issues from the statement of issues, and failing to make any argument at all to the Alabama Supreme Court in his petition for certiorari review. We disagree.

In representing a defendant on appeal, the best appellate attorneys make strategic decision narrowing the issues that they will raise on appeal rather than attempting to raise every conceivable issue. *Jones v. Barnes*, 463 U.S. 745, 751-1, 103 S.Ct. 3308, 3312, 77 L.Ed.2d 987 (1983).

In preparing for the appeal and in deciding what issues to raise, Mr. Mays studied the trial record very carefully. He did extensive research, including the examination of law review articles, and he selected what in his judgment were the best available issues to raise on appeal. In selecting issues, Mr. Mays carefully considered

how arguments in support of these issues could be answered by the other side and how the appellate court might respond to those issues. Moreover, during the course of handling Johnson's appeal, Mr. Mays consulted with both trial counsel concerning issues in the case. Mr. Mays based his lengthy statement of the facts contained in appellant's brief upon the detailed testimony of witnesses at trial.

After this court affirmed the conviction and sentence, Mr. Mays submitted the same brief to the Alabama Supreme Court in support of a petition for writ of certiorari. He did so because he believed that the arguments he had made were adequate legal arguments based upon the applicable law.

The attack of Johnson's present counsel on Mr. Mays's performance consists primarily of a long list of things that they would have done differently had they been representing Johnson on appeal. They argue at length that Mr. Mays rendered ineffective assistance because he failed to include in the statement of facts the "three robbers" theory which they have concocted on this collateral appeal.

We hold that Mr. Mays's appellate representation of Johnson did not fall outside "the wide range of reasonable professional assistance," and that Johnson not only failed to establish the performance deficiency component of this ineffective assistance claim but also failed to establish the prejudice component.

C. Ineffective Assistance of Trial Counsel During Sentencing Phase

Johnson initially claims that his trial counsel rendered ineffective assistance in the presentation of Johnson's drug abuse as a mitigating circumstance. We disagree.

The record reveals that the trial counsel from the beginning to the end of the sentence proceedings did an effective job presenting Johnson's drug abuse and addiction problem as a mitigating circumstance. Three of the four witnesses presented at the jury sentence proceeding, which the sentencing judge presided over, were called by counsel to testify about Johnson's drug problem. Counsel were handicapped in their presentation of Johnson's drug abuse problem by his adamant refusal to testify at the sentence stage. Johnson, moreover, completely failed to prove at the evidentiary hearing on his Rule 20 petition, as amended, that he ever told trial counsel that he had been on drugs at the time of the crime. While there was some momentary uncertainty about whether the drug abuse level that trial counsel could present would rise to the level of the § 13A-5-51(6) mental state statutory mitigating circumstances, trial counsel never wavered in their determination to present drug abuse as a factor which should be considered in mitigation.

We therefore hold that trial counsels' vigorous and effective efforts to present Johnson's drug abuse as a mitigating circumstance throughout the sentence proceedings do not fall outside the "wide range of reasonable professional assistance." In addition, Johnson has not shown a reasonable probability that any other efforts or tactics by trial counsel relating to the drug abuse problem would have changed the sentence imposed by the trial court.

Johnson also claims that trial counsel rendered ineffective assistance by failing to object to the omission of the "third robber" theory from the statement of facts in *1304 the pre-sentence report and the court's sentence findings and by failing to include the "third robber" theory in support of Johnson's "minor" participation in the crime.

As discussed earlier, Johnson's "third robber" theory is merely a theory without any evidentiary support, and trial counsels' failure to espouse this theory in the face of overwhelming evidence to the contrary can hardly be deemed deficient performance which prejudiced Johnson.

D. Ineffective Assistance of Appellate Counsel During Sentencing Phase

Johnson claims that his appellate counsel rendered ineffective assistance by raising only frivolous sentencing issues on appeal instead of raising six substantive sentencing issues.

We have reviewed this issue and agree with the trial court that it lacks merit. Not only has Johnson failed to demonstrate that his appellate counsels' performance with respect to the sentence phase was deficient, but he has also failed to show prejudice resulting from his appellate counsels' performance. We note in particular that on the one hand Johnson chastises his appellate counsel for raising a "frivolous" issue that had already been decided adversely by the Alabama appellate courts, but on the other hand Johnson urges his appellate counsel to raise an issue that has already been decided adversely by the appellate courts.

The judgment of the trial court is due to be affirmed.

The foregoing opinion was prepared by the Honorable JAMES H. FAULKNER, a former Alabama Supreme Court Justice, and his opinion is hereby adopted as that of the court.

AFFIRMED.

All the Judges concur.

END OF DOCUMENT

APPENDIX E

Order

Circuit Court of
Morgan County, Alabama

June 17, 1991

89-415

ORIGINAL

ANTHONY KEITH JOHNSON, Petitioner	)	IN THE CIRCUIT COURT OF
vs.	)	MORGAN COUNTY, ALABAMA
STATE OF ALABAMA, Respondent	)	CASE NO. CC-84-0331

Return to Remand

FILED
JUN 17 1991
CLERK
ALA COURT CRIMINAL APPEALS

O R D E R

In response to the joint motion heretofore filed by the respective parties to this proceeding, the Court hereby makes the following specific findings of fact as to the various issues raised by the appellant in his petition:

1. The following claims by the petitioner are procedurally barred as they could have been raised at trial or on appeal:

   a. Search and seizure involving the weapon
   b. Lesser included offense
   c. Reasonable doubt jury instruction
   d. Factual basis of sentence findings
   e. Pre-sentence report
   f. Statutory mitigating circumstances
   g. Intent to kill
   h. Jury verdict override provision
   i. Sufficiency of the evidence to sustain the conviction of petitioner
   j. Search and seizure involving removing the bullet from the petitioner's body

2. In addition, the above claims 1 a-j also lack legal merit.

3. The following claims by the petitioner are not procedurally barred:

   a. Brady v. Maryland claim
   b. Guilt stage ineffective assistance claim
   c. Appellate level ineffective assistance claim relating to guilt stage issues
   d. Sentencing stage ineffective assistance claim

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e. Appellate level ineffective assistance claim relating to sentencing stage issues

4. The above claims 3 a-e lack legal merit.

Therefore, it is hereby ORDERED, ADJUDGED and DECREED by the Court that the petitioner's Petition from Relief from Conviction and Sentence heretofore filed in this cause on April 3, 1989 is hereby denied and overruled.

DONE and ORDERED this 14th day of June, 1991.

John J. Kelly
CIRCUIT JUDGE

APPENDIX F

Opinion

Supreme Court of Alabama

February 5, 1988

Supreme Court of Alabama.

Ex parte Anthony Keith JOHNSON.
(Re: Anthony Keith Johnson

v.

State of Alabama).

No. 86-792.

Feb. 5, 1988.

Petition for Writ of Certiorari to the Court of Criminal Appeals (8 Div. 446).

John E. Mays, Decatur, for petitioner.

Don Siegelman, Atty. Gen., and William D. Little, Joseph G.L. Marston III, and Rivard Melson, Asst. Attys. Gen., for respondent.

PER CURIAM.

Pursuant to Rule 39(c), A.R.App.P., we granted the defendant's petition to review the judgment of the Court of Criminal Appeals affirming his conviction and sentence of death. *Johnson v. State*, 521 So.2d 1006 (Ala.Cr.App.1986).

After carefully and thoroughly considering the record of trial, the Court of Criminal Appeals' opinion, and the briefs and arguments of the parties, we find no basis for reversal of the judgment of the Court of Criminal Appeals.

AFFIRMED.

All the Justices concur.

END OF DOCUMENT

APPENDIX G

Opinion

Court of Criminal Appeals of Alabama

November 25, 1986

Court of Criminal Appeals of Alabama.

Anthony Keith JOHNSON
v.
STATE.

No. 8 Div. 446.

Nov. 25, 1986.

Rehearing Denied Jan. 27, 1987.

1007 John E. Mays, Decatur, for appellant.

Charles A. Graddick, Atty. Gen., and Rivard Melson, Asst. Atty. Gen., for appellee.

TAYLOR, Judge.

Appellant, Anthony Keith Johnson, was indicted by the June 1984 term of the Morgan County Grand Jury for the intentional murder of Kenneth Cantrell, during the course of a robbery, in violation of § 13A-5-40, Code 1975. The indictment charged specifically that "Anthony Keith Johnson ... did intentionally cause the death of Kenneth Cantrell by shooting him with a pistol" and that he "caused said death during ... the course of attempting to commit a theft of property of Kenneth Cantrell ... by the use of force against the person of Kenneth Cantrell with intent to overcome his

physical resistance or physical power of resistance...." Appellant was subsequently tried and found guilty as charged in the indictment. A sentencing hearing was held, at which the jury recommended that appellant be sentenced to life imprisonment without parole. The trial court overrode the jury's recommendation and, on November 8, 1985, sentenced appellant to death.

The record reveals that on the evening of March 11, 1984, the victim, Kenneth Cantrell, and his wife, Nell Cantrell, were at their home in Hartselle, Alabama. The Cantrells had been in the jewelry business for 24 years and at this time were conducting the business from their home.

Mrs. Cantrell received a phone call from a person identifying himself as Bill Spears from Florence, Alabama, and he asked to speak to Mr. Cantrell. He told Mr. Cantrell that he would like to purchase some jewelry from him, and they arranged a meeting a short time thereafter at the Cantrell home. Mr. Cantrell was apparently suspicious of the caller, because he asked his wife to hide his wallet and bring him his .38 caliber pistol.

When Mrs. Cantrell heard a knock at the door, which led from their carport into the combined living room and dining room area of their home, she went to answer it. She observed that the man already had the storm door open, but she had to open the door to hear what he had to say. When she opened the door she encountered a man between 45 and 50 years of age who identified himself as Bill Spears. She noticed that he held one hand behind his back and she asked if he was concealing something. *1008 He said that he was not and showed her his hand.

At the same time he motioned for another man who had been hiding in the carport to come forward. At this, the man already at the door grabbed Mrs. Cantrell, and the other man, wearing a blue bandana over his face and brandishing a "real shiney" gun in his hand, announced "This is a holdup."

Mrs. Cantrell, attempting to warn her husband, was able to break free from the first man who was holding her, run to her husband and fall at his feet. As she lay at her husband's feet she heard one of the men say, "Come on in, Bubba, I have got him," whereupon Mr. Cantrell said, "Freeze.... No we have got you" and one of the men said, "No, we have got you." During this verbal exchange one of the men fired at Mr. Cantrell; he returned fire and a short gun battle ensued. Mrs. Cantrell lay motionless at her husband's feet while this exchange occurred, only raising her head up enough to notice that one man had on brown boots. After a number of shots were exchanged, there was a silence, and then Mr. Cantrell fired one last shot. When this shot was fired she heard one of the intruders say, "Oh", and then she heard the sound of shuffling feet, as if one of the intruders was assisting the other in getting out the door.

Mrs. Cantrell waited a moment after the intruders left, looked up at her husband, noticed that he had blood all over him and that she had blood all over her but that she was not shot. She then called an ambulance and police to the scene.

Mr. Cantrell sustained six gunshot wounds in the exchange, three in the right side of his chest, one in the left side of his chest, one on the back of his right arm, and one to his right middle finger. The bullets which struck him in the chest passed through his lungs and the large arteries from the heart, causing rapid death.

On the evening of March 12, 1984, the day after the murder, appellant went to the home of David Lindsey, who was a friend, in Newell, Alabama. Appellant told Lindsey that he had been shot. When Lindsey inquired as to what had happened, appellant stated, "Well you know how it is when you have got the habit." Appellant told Lindsey that he knew he had been to Vietnam and asked if he knew a medic or someone who could get the bullet out. Lindsey told him that he knew no one who could do that.

At appellant's request, Lindsey, on the morning of March 13, 1984, drove him to a motel in Oxford to meet Gene Loyd. Lindsey testified that Loyd and appellant were glad to see each other, and Loyd asked appellant where he had been. Appellant replied that he "had to get the hell out of Hartselle." He said that he and some friends had gone into a place to get some gold and that he had been shot. According to Lindsey, appellant stated, "I got shot, but I got off a couple of rounds, and I believe I got that son of a bitch." Lindsey returned home, where he heard that a murder had occurred in Hartselle, and he contacted authorities.

Appellant was arrested on March 14, 1984, at the motel where he had been taken by Lindsey. A pair of brown boots, which appellant claimed to own, were found at the scene of the arrest. A bullet wound was discovered in his back; that wound was 50.5 inches from the ground when appellant was standing. A search warrant was obtained, and the bullet was removed from his back.

It was discovered that Mr. Cantrell had fired his R.G. brand revolver six times at the intruders. Most of the shots were in an upward direction from the point where he was sitting on his couch. The revolver was loaded with .38 special C.C.I. Blazer cartridges manufactured by Omark

Industries. Four C.C.I. Blazer bullets were recovered from objects which they had struck at the scene. One bullet apparently passed through the ceiling and could not be found. One bullet passed through a pane of glass on the back door 46.375 inches from the ground. A search of cardboard boxes and the wall in this bullet's path failed to reveal the bullet. The four C.C.I. Blazer bullets found at the scene had the same number of lands and grooves as the bullets test fired *1009 from Mr. Cantrell's R.G. revolver, but it was impossible to definitely make a determination that Mr. Cantrell's revolver actually fired the bullets.

The bullet which was removed from appellant's back was a .38 special C.C.I. Blazer. The bullet had the same number of lands and grooves as those test fired from Mr. Cantrell's R.G. revolver and those found at the scene, but again, it was impossible to make a definite determination that Mr. Cantrell's revolver actually fired the bullet.

The bullet which was removed from appellant's back had glass imbedded in its nose. Test comparisons of the glass removed from the bullet and that found in the pane on the back door, through which the unaccounted-for bullet had passed, revealed that all of their physical properties matched, with no measurable discrepancies. Based upon F.B.I. statistical information, it was determined that only 3.8 out of 100 samples could have the same physical properties, based upon the refractive index test alone, which was performed.

I

Appellant contends that the trial court erred in permitting the State to challenge juror Carrell for cause over appellant's objection. Appellant argues that juror Carrell was not unalterably opposed to the death penalty and that she

was able to follow the trial court's instruction as to the law. He contends that when the trial court permitted the challenge for cause of juror Carrell it effectively denied appellant a fair trial under the Sixth and Fourteenth Amendments of the United States Constitution.

The most pertinent questions posed to juror Carrell on this issue by District Attorney, Mike Moebes, defense attorney, Thomas Digiulian, and the trial court and the corresponding answers given by juror Carrell were as follows:

> "MR. MOEBES: Well, let's say if you heard all of the evidence and the testimony and the witnesses and the Judge's charge on the law and your oath, if the evidence in this case proved to you beyond a reasonable doubt and to a moral certainty that the Defendant was guilty as charged, would you return a verdict of guilty?
>
> "JUROR CARRELL: Well, I guess you would almost have to.
>
> "MR. MOEBES: Well, if one of the punishments in this case for such an offense is that of death by electrocution—
>
> "JUROR CARRELL: No, I couldn't do that.
>
> "MR. MOEBES: You could not do it?
>
> "JUROR CARRELL: No, I couldn't do that.

"MR. MOEBES: Under no circumstances would you consider the punishment of death by electrocution?

"JUROR CARRELL: No, sir. I couldn't do that.

"MR. MOEBES: Anyone else?

(NO RESPONSE)

"MR. MOEBES: Then I take it, Mrs. Carrell, that what you have said is that you would not be willing to consider the death penalty as provided by law in this case, is that what you are saying?

"JUROR CARRELL: Electrocution. I mean I just—I just cannot—I don't feel like it is my place to put somebody else's life in my hands. I mean I just—my belief is we are not—we are just—we are not suppose to take another human being's life in our hands.

"MR. MOEBES: Mrs. Carrell, I am not asking you to defend your position. I just want to know what your position is now. Be truthful with me and the Court and the lawyers over there.

"JUROR CARRELL: I couldn't do it.

"MR. MOEBES: That is what we want to know, is how you fell about the death penalty.

"JUROR CARRELL: I couldn't do it.

"...

"MR. MOEBES: Then I take it, Mrs. Carrell, that you feel that you would never under any circumstances vote as a juror for a death penalty?

*1010 "JUROR CARRELL: No, I wouldn't.

"MR. MOEBES: I take it that you would refuse to apply the death penalty no matter how strong the evidence and under all circumstances in any case?

"JUROR CARRELL: That is right. I just don't believe I could do it.

"...

"MR. DIGIULIAN: ... Now, I believe you testified in response to Mr. Moebes that you didn't think there would be any circumstances under which you could require someone to be put to death for the commission of a crime, is that correct?

"JUROR CARRELL: That is right.

"MR. DIGIULIAN: Now, is that based on your religious beliefs?

"JUROR CARRELL: I feel like there should be punishment, but I just don't feel like I could say by death, you know.

"MR. DIGIULIAN: Now, is that in this case alone or any?

"JUROR CARRELL: I just don't think—I wouldn't want to have it on my neck—on my heart and my hands that I did that to somebody.

"...

"MR. DIGIULIAN: ... As jurors you would be called on to do your civic duty in this case if you are chosen to hear the evidence and render a verdict in accordance with your oath and instructions from the Court and the evidence that you hear. Now if you were chosen as a juror in this case, would you be able as your civic duty to listen to the evidence and follow your oath as a juror, which would require you to consider the imposition of the death penalty in this case?

"JUROR CARRELL: You know, that is hard to answer. I am real nervous, too. I mean I have stated my feelings, you know, and I just don't know. I mean I would have to follow the oath. I know that. We need to—we have got to have laws, but still in my own heart I

just can't find where I could say death by electrocution or, you know, just death, you know. It would really bother me.

"MR. DIGIULIAN: But then that is a serious thing to have to do, isn't it?

"JUROR CARRELL: That is right.

"MR. DIGIULIAN: It should bother everybody, shouldn't it?

"JUROR CARRELL: That is right.

"MR. DIGIULIAN: But you would follow your oath, would you not?

"JUROR CARRELL: Yes I would follow it.

"MR. DIGIULIAN: Following your oath and consider the death penalty in this case—you would follow your oath, would you not? Don't make me put words in your mouth. Answer from your heart.

"JUROR CARRELL: I guess that—now explain a little bit about following the oath. To me that means—see, lots of this is new to me. This is my first experience as a juror or to be in a courtroom or anything, and I am very nervous. I want to do the right thing, and I know there are others involved and that

the other family is involved, too, in this, but still—

"MR. DIGIULIAN: Ma'am, you—

"JUROR CARRELL: I don't know. I—could I just say it would be hard for me to say until I am in that situation—really there in that area. When it is like this situation is with me, and as many people as we have to pick from with people feeling in their hearts like I do, why would we even have to do that. Why were we put in a position to make this choice.

"...

"MR. DIGIULIAN: ... In your oath as a juror it provides that you will well and truly try all issues which may be submitted to you and true verdicts render according to the evidence. That is your oath. I am not trying to put you on the spot. I want to know what you think.

"JUROR CARRELL: I would have to really—I mean my feelings would—I would have to follow my oath. I would have to do what I felt right, you know.

"...

"MR. DIGIULIAN: In the event that you were called to be a juror in the trial of the murder of a child, and that is not the *1011 case here, but maybe it is a brutal murder and the child was maybe tortured, would you then

consider the death penalty under those kind of circumstances?

"JUROR CARRELL: Well, can I answer like this? I know there has to be punishment, but there again it would be hard for me to say yes, death, you know. I just feel like we are not—I don't have that person's life in my hands to judge, and I know now being a juror we are to judge, but I guess that is the reason I said—I am a strong believer in my religion, you know, and I know that we are not supposed to take lives.

"MR. DIGIULIAN: But you would follow your oath as a juror?

"JUROR CARRELL: I would have to follow my oath.

"MR. DIGIULIAN: And you would discharge your duty even though it would be hard.

"JUROR CARRELL: It would be hard, but I would have to follow my oath.

"...

"MR. MOEBES: If you were chosen as a juror in the trial of this case, would your views on capital punishment prevent or substantially impair the performance of your duties as a juror in accordance with your

instructions and oath? That is either prevent or substantially impair.

"JUROR CARRELL: It would probably prevent.

"MR. MOEBES: In your opinion it would prevent it?

"JUROR CARRELL: Uh-huh.

"...

"THE COURT: Mrs. Carrell, can you think of any case that you would impose the death penalty in? Just answer me, can you or can't you?

"JUROR CARRELL: No.

"THE COURT: Is your belief based on your religious convictions that you shouldn't kill another human being under any circumstances?

"JUROR CARRELL: That is right. It is based on that."

In *Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985),* the Supreme Court reaffirmed and again set forth the proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment. The standard, as stated by the Court, is "whether the juror's views would prevent or

substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." The Court went on to note that the juror's bias need not be proved with "unmistakable clarity," and in discussing its reasoning stated:

> "This is because determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism. What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made unmistakably clear; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. For reasons that will be more fully developed *infra*, this is why deference must be paid to the trial judge who sees and hears the juror."

Wainwright v. Witt, supra, 469 U.S. at 424-26, 105 S.Ct. at 852-53.

From the record, as set forth above, it is apparent that juror Carrell vacillated in her answers regarding her ability to fulfill her oath. Her final response on the issue, when asked whether her views would either prevent or substantially impair the performance of her duties in accordance with the trial court's instructions and her oath, was that "It would probably prevent." In view of this statement and the cumulative effect of her other responses, we find that juror Carrell sufficiently indicated *1012 that her bias towards the

death penalty would indeed prevent the performance of her duties as a juror in this case. Accordingly, we find that the trial court committed no error in permitting the State to challenge juror Carrell for cause.

II

The appellant contends that the trial court erred when it refused to instruct the jury that they could not consider the theft (by the use of force) allegation in the capital murder indictment as an aggravating circumstance in the penalty phase of the trial. The appellant cites *Keller v. State*, 380 So.2d 926 (Ala.Cr.App.1979), *cert. denied*, 380 So.2d 938 (Ala.1980), and *Bufford v. State*, 382 So.2d 1162 (Ala.Cr.App.) *cert. denied*, 382 So.2d 1175 (Ala.1980), in support of this argument. The trial court, in refusing this charge, correctly noted that this line of cases was overruled by *Kyser v. State*, 399 So.2d 330 (Ala.1981). See also *Dobard v. State*, 435 So.2d 1338 (Ala.Cr.App.1982), *affirmed*, 435 So.2d 1351 (Ala.1983), *cert. denied*, 464 U.S. 1063, 104 S.Ct. 745, 79 L.Ed.2d 203 (1984).

Furthermore, § 13A-5-50, Code of Alabama 1975, entitled *Consideration of Aggravating Circumstances in Sentence Determination*, provides as follows:

> "The fact that a particular capital offense as defined in section 13A-5- 40(a) necessarily includes one or more aggravating circumstances as specified in section 13A-5-49 shall not be construed to preclude the finding and consideration of that relevant circumstance or circumstances in determining sentence. By way of illustration and not limitation, the aggravating circumstance specified in section 13A-5-49(4) shall be

> found and considered in determining sentence in every case in which a defendant is convicted of the capital offenses defined in subdivisions (1) through (4) of subsection (a) of section 13A-5-40."

Pursuant to this code provision and the decisions in *Kyzer*, supra, and *Dobard*, supra, we can find no basis for the appellant's contention that this charge should have been given. Accordingly, we find that the trial court committed no error in refusing the requested charge.

III

Appellant contends that the trial court erred in refusing his motions for judgment of acquittal on the grounds that there was no proof that he was in Morgan County, where the murder was committed, and no proof that the gun which he possessed at the time he was arrested was used in the shooting.

Contrary to appellant's contention that there was no proof he was in Morgan County when the murder was committed, we find that considerable evidence was presented on this issue. According to the testimony of David Lindsey, appellant, by his own admission stated that he had been in Hartselle, that he was involved in a robbery, that he had been shot, and that he believed he had a shot the man who shot him. There was also considerable additional circumstantial evidence, as a ready set forth above, which placed appellant at the scene of the crime.

We note that the jury was fully informed that a pistol which was found in appellant's possession when he was arrested was not the murder weapon and that they apparently accorded this fact little weight. The jury apparently did not

find it unusual that the appellant no longer had the murder weapon in his possession when he was arrested some three days after the murder was committed.

In *Cumbo v. State*, 368 So.2d 871 (Ala.Cr.App.1978), *cert. denied*, 368 So.2d 877 (Ala.1979), this court stated:

> "In reviewing a conviction based on circumstantial evidence, this court must view that evidence in the light most favorable to the prosecution. The test to be applied is whether the jury might reasonably find that the evidence excluded every reasonable hypothesis except that of guilt; not whether such evidence excludes every reasonable hypothesis but guilt, but whether a jury might reasonably so conclude." (Citations omitted.)

*1013 See also *Daniels v. State*, [Ms. 1 Div. 92, Nov. 16, 1985] (Ala.Cr.App.1985).

Viewing the State's evidence by this principle we find that the evidence was more than sufficient to allow the jury to reasonably conclude that the evidence excluded every reasonable hypothesis except that of guilt. Accordingly, we find that the trial court did not err in denying appellant's motion for judgment of acquittal.

IV

Appellant, finally, contends that the trial court erred when it refused to strike information from a pre-sentence report indicating that marijuana was found at the scene where the defendant was arrested. When appellant requested that this information be stricken from the report, the trial court replied, "I won't strike it, but I won't consider it as being [an] aggravating circumstance." The sentencing order reveals

that the trial court, in fact, did not consider this information in pronouncing sentence upon the appellant.

In a most relevant portion of *Thompson v. State*, 503 So.2d 871 (Ala.Cr.App.1986), this Court found as follows:

> "The appellant contends that the inclusion in the pre-sentence report's criminal history section of charges that had not resulted in convictions was reversible error. However, Rule 3(b)(2), Alabama Temporary Rules of Criminal Procedure, specifies that the pre-sentence report may contain the 'defendant's prior criminal and juvenile record, if any.' It is clear that the inclusion of charges that did not result in convictions is proper because the Rule allows for juvenile charges to be included. It is well settled that juvenile charges, even those that result in an adjudication of guilt, are not convictions and may not be used to enhance punishment. See *Baldwin v. State*, 456 So.2d 117, 125 (Ala.Crim.App.1983), aff'd, 456 So.2d 129 (Ala.1984), aff'd, [472] U.S. [372], 105 S.Ct. 2727, [86] L.Ed.2d [300] (1985). The inclusion of the charges in no way prejudiced the appellant. The trial judge did consider some of the charges listed, but only those which had resulted in convictions."

From the above, it is apparent that the mere presence of information in the pre-sentence report which should not be considered for the purpose of enhancing punishment is not, *per se*, prejudicial. In sentencing the appellant, the trial court in the instant case did not consider the portion of the report which indicated that marijuana was found at the scene. Consequently, we find that although this information was not

stricken from the report as requested, it in no way prejudiced the appellant.

V

As required by § 13A-5-53(a), Code of Alabama 1975, this court reviews the propriety of the imposition of the death penalty in this case. Our review must include a determination of the following questions:

(1) Was any error adversely affecting the rights of the defendant made in the sentence proceedings?
(2) Were the trial court's findings concerning the aggravating and mitigating circumstances supported by the evidence?
(3) Was the death penalty the proper sentence in this case?

As to the first question, we have reviewed the sentence proceedings and have found no error adversely affecting the defendant's rights. As to the second question, we have reviewed the record and are satisfied that the trial court's written findings concerning the aggravating and mitigating circumstances are fully supported by the evidence.

To answer the third question, whether the death penalty was properly imposed in this case, we must determine:

"(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;
"(2) Whether an independent weighing of the aggravating and mitigating circumstances at the appellate level indicates that death was the proper sentence; and
*1014 "(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

Code of Alabama 1975, § 13A-5-53(b); see also *Beck v. State*, 396 So.2d 645 (Ala.1980).

There is nothing in the record before us which even intimates that the death penalty was imposed under the influence of passion, prejudice, or any other arbitrary factor.

Our independent weighing of the aggravating and mitigating circumstances leaves us with no doubt that the death penalty was appropriate in this case. We find that there were two statutory aggravating circumstances in this case, as provided by § 13A-5-49(1) and (4), Code of Alabama 1975. Those were that appellant committed the offense while he was under a sentence of imprisonment and that the capital offense was committed during the course of a robbery. We further find that there were no statutory mitigating circumstances, as provided by § 13A-5-51, Code of Alabama 1975. Finding none of the nonstatutory mitigating circumstances raised by appellant to have merit, we determine that the aggravating circumstances clearly outweigh the mitigating circumstances and that the death penalty was appropriate in this case.

In regard to the final determination this court must make, we find that the death penalty imposed on the defendant is not excessive or disproportionate to the penalty imposed in similar cases. See, e.g., *Hamilton v. State*, 520 So.2d 155 (Ala.Cr.App.1986); *Thomas v. State*, 460 So.2d 207 (Ala.Cr.App.1983), affirmed, 460 So.2d 216 (Ala.1984); *Singleton v. State*, 465 So.2d 432 (Ala.Cr.App.1983), affirmed, 465 So.2d 443 (Ala.1985); *Bush v. State*, 431 So.2d 555 (Ala.Cr.App.1982) affirmed, 431 So.2d 563 (Ala.), *cert. denied*, 464 U.S. 865, 104 S.Ct. 200, 78 L.Ed.2d 175 (1983); *Jacobs v. State*, 361 So.2d 607 (Ala.Cr.App.1977), affirmed, 361 So.2d 640 (Ala.1978),

cert. denied, 439 U.S. 1122, 99 S.Ct. 1034, 59 L.Ed.2d 83 (1979).

As required by Rule 45A, A.R.A.P., we have searched the record for any plain error or defect in the proceedings below, which may or may not have been brought to the attention of the trial court, which might adversely affect the substantial rights of the appellant. In doing so we discover that the appellant objected to the introduction of the bullet which was removed from his back.

The bullet was removed from appellant's back pursuant to a search warrant issued by the Circuit Court of Morgan County. Appellant, after the warrant was issued, petitioned this court for a writ of prohibition, which we denied in *Ex parte Johnson,* 452 So.2d 888 (Ala.Cr.App.1984). While the appellant did not raise it on appeal, we believe that we should address any effect of *Winston v. Lee,* 470 U.S. 753, 105 S.Ct. 1611, 84 L.Ed.2d 662 (1985), upon our decision to allow the surgical removal of the bullet, as the direct consequence of that decision was the introduction of the bullet at trial.

In *Winston,* a shopkeeper was wounded during an attempted robbery, but, being armed himself, was apparently able to wound his assailant in the left side before he fled. Lee was found eight blocks from the scene suffering from a gunshot wound to his left chest.

The Commonwealth of Virginia moved in state court for an order directing Lee to undergo surgery to remove the bullet, asserting that the bullet would provide evidence of Lee's guilt or innocence. As a result of expert testimony, which indicated that the surgery would require an incision of only ½ inch, and would be performed under local anesthesia

without incurring the dangers of general anesthesia, the trial court granted the motion to compel Lee to undergo surgery. The Virginia Supreme Court, thereafter, denied Lee's petition for a writ of prohibition. Lee then attempted to have the operation enjoined by bringing an action, based on Fourth Amendment grounds, in the United States District Court for the Eastern District of Virginia. That court refused to issue an injunction.

Just prior to surgery, however, X-rays revealed that the bullet was, in fact, substantially deeper in Lee's chest than earlier believed, and the surgeon determined that general anesthesia would be needed. Lee moved for a rehearing, which was denied by the trial court, and that denial was affirmed by the Virginia Supreme Court. He then returned to the federal district court, which, after an evidentiary hearing, enjoined the surgery. The Court of Appeals for the Fourth Circuit affirmed, and the United States Supreme Court granted certiorari to consider whether a State could compel a suspect to undergo this type of surgery in a search for evidence of a crime.

The Supreme Court stated that "[t]he reasonableness of surgical intrusions beneath the skin depends on a case-by-case approach, in which the individual's interests in privacy and security are weighed against society's interests in conducting the procedure." The Supreme Court in discussing the risks associated with the surgical procedure noted that one surgeon had testified that due to the difficulty of discovering the exact location of the bullet, extensive probing and retracting of the muscle tissue could be required, which could lead to injury of the muscle, blood vessels, and nerves. The Court also noted medical testimony which indicated that the greater intrusion into the chest cavity and the larger incisions required would increase the risk of infection. The Court also addressed the fact that Lee would

be required to undergo general anesthesia and found that "[t]his kind of surgery involves the total divestment of respondent's ordinary control over surgical probing beneath his skin."

In examining the other part of the balance, society's interest in conducting the procedure, the Court found that arguments of a compelling need for the bullet were not persuasive. The Court noted that the Commonwealth had available to it substantial additional evidence that Lee was the individual who accosted the shopkeeper on the night of the robbery. The Court went on to affirm the decision of the district court prohibiting the surgical removal of the bullet.

We believe that the instant case can be distinguished from *Winston.* Here, there was competent medical testimony which established that the bullet was lodged in fatty tissue, just beneath the skin, in the area of the shoulder blade; that surgery would be minor and would be performed with local anesthetic; and that practically no danger to life or health would be presented by the surgery. Due to the almost non-existent risk of danger to appellant as a result of the surgery and the potential value of the bullet to the State's case, we find that the appellant's interest in privacy and security did not outweigh society's interest in conducting the procedure. Therefore, we reaffirm our decision in *Ex parte Johnson,* supra, which permitted the surgical removal of the bullet, and we find that the bullet was properly introduced into evidence at trial.

A further review of the record pursuant to Rule 45A, A.R.A.P., reveals no other issue which might adversely affect the rights of the defendant. We, therefore, find that the judgment of the trial court is due to be affirmed.

AFFIRMED.

All the Judges concur.

ADDENDUM
STATE OF ALABAMA, PLAINTIFF
VS.
ANTHONY KEITH JOHNSON, DEFENDANT
NO. CC84-0331
IN THE CIRCUIT COURT OF MORGAN COUNTY, ALABAMA
DETERMINATION OF SENTENCE BY COURT 13A-5-47, CODE OF ALABAMA 1975

The sentencing hearing in this case has been conducted, the jury has returned an advisory verdict and the Court now proceeds to determine the sentence.

The Court has previously ordered a pre-sentence investigation report which has been filed containing the information prescribed by law for felony cases. The Court requested no specific additional information. None of the report was kept confidential and a hearing has been held in open court to afford both sides an opportunity to respond to the pre-sentence report and present any evidence about any portion of it that might be subject to factual dispute. This hearing has been recorded by the Reporter.

At the conclusion of the hearing the Court afforded each side an opportunity to present arguments concerning the existence of aggravating and mitigating circumstances. The order of the argument was the same as at the trial of a case.

The Court now proceeds to enter specific written findings concerning the existence or non-existence of each aggravating circumstance enumerated in Section 13A-5-49, *Code of Alabama 1975*.

Aggravating Circumstances

1. The Court finds beyond a reasonable doubt the aggravating circumstance defined in 13A-5-49(1) EXISTS in this case in that the capital offense was committed by a person under sentence of imprisonment.

2. The aggravating circumstance defined in Section 13A-5-49(2) DOES NOT EXIST and no evidence in support of such an aggravating circumstance was offered.

3. The aggravating circumstance defined in Section 13A-5-49(3) DOES NOT EXIST and no evidence in support of such an aggravating circumstance was offered.

4. The Court finds beyond a reasonable doubt that the aggravating circumstance defined in Section 13A-5-49(4) EXISTS in this case by reason that the capital offense was committed while the defendant was engaged in the commission of a robbery.

5. The aggravating circumstance defined in Section 13A-5-49(5) DOES NOT EXIST and no evidence in support of such an aggravating circumstance was offered.

6. The aggravating circumstance defined in Section 13A-5-49(6) DOES NOT EXIST and no evidence in support such an aggravating circumstance was offered.

7. The aggravating circumstance defined in Section 13A-5-49(7) DOES NOT EXIST and no evidence in support of such an aggravating circumstance was offered.

8. The aggravating circumstance defined in Section 13A-5-49(8) DOES NOT EXIST and no evidence in support of such an aggravating circumstance was offered.

Mitigating Circumstances—Generally

1. The Court finds that the mitigating circumstance defined in 13A-5-51 DOES NOT EXIST in that the defendant does have a significant history of prior criminal activity.

2. The mitigating circumstance defined in 13A-5-51(2) DOES NOT EXIST in that the capital offense was not committed while the defendant was under the influence of extreme mental or emotional disturbance.

3. The mitigating circumstance defined in 13A-5-51(3) DOES NOT EXIST in that the victim was not a participant in the defendant's conduct and did not consent to it.

4. The mitigating circumstance defined in 13A-5-51(4) DOES NOT EXIST. The defendant was an accomplice in the capital offense committed, but the evidence does not clearly demonstrate that it was "committed by another person." Whether the defendant actually fired a fatal shot or not, his participation cannot be considered relatively minor. His participation was substantial and critical.

5. The mitigating circumstance defined in 13A-5-51(5) DOES NOT EXIST in that the record does not reflect that the defendant was under extreme duress or under the substantial domination of another person.

6. The mitigating circumstance defined in 13A-5-51(6) DOES NOT EXIST in that there is no substantial evidence before the Court that the capacity of the defendant to appreciate the criminality of his conduct or conform his conduct to the requirements of law was substantially impaired. Defendant argues that he had a dope habit, but *1017 there is no evidence that he was under the influence of any drug which impaired his responsibility at the time of the murder. The evidence reflects that his actions before, during and after the crime were calculated and completely subject to his control.

7. The mitigating circumstance defined in 13A-5-51(7) DOES NOT EXIST in that the age of the defendant at the time the crime was committed was 27 years.

The Court has addressed all of the statutory mitigating circumstances although the defendant only argued those enumerated in (1), (4), (6) and (7) of Section 13A-5-51, *Code of Alabama 1975*.

Consideration of Defendant's Character Record Section 13A-5-52, Code of Alabama 1975

In addition to the mitigating circumstances specified in Section 13A-5-51, the Court has considered all aspects of defendant's character of record and the circumstances of the offense which the defendant has offered as a basis for a

sentence of life imprisonment without parole instead of death. The Court further invited the defendant to direct the Court's attention to any other relevant mitigating circumstances from any source. The Court finds that there are some statements in the pre-sentence report and some other aspects of the case that have certain mitigating aspects to them. These were considered.

Consideration of the Jury's Verdict

The Court has independently weighed the jury's verdict, which was for life imprisonment without parole, and considers it an aspect of mitigation, separate and apart and in addition to the mitigating circumstances provided by Section 13A-5-51, Section 13A-5-52.

Weighing of Aggravating and Mitigating Circumstances
Section 13A-5-48, Code of Alabama 1975

The Court now proceeds to weigh the aggravating and mitigating circumstances to determine the appropriate sentence under the law. The Court has not merely tallied for the purpose of numerical comparison the aggravating and mitigating circumstances, but has marshaled and considered in organized fashion, for the purpose of determining the proper sentence, all of the circumstances in this case whether aggravating or mitigating, including all relevant mitigating circumstances whether enumerated in the criminal code or not, including the jury's recommendation.

The Court finds the aggravating circumstances are substantial and controlling. The mitigating circumstances (other than the jury's recommendation) can be found only by a strained search and are deemed insubstantial by the Court

in the face of the evidence which demonstrates a vicious killing of a man in what should have been the quiet repose and safety of his own home.

The Court sentences the defendant, after allocution, to death by electrocution on a date to be fixed by the Supreme Court of this State after disposition of the automatic appeals provided for by law. The Sheriff shall immediately transfer the defendant to the custody of the Director of Corrections and Institutions who shall execute the following judgment of the Court:

JUDGMENT

On this date the defendant was brought before the Court for the purpose of imposing sentence. He was accompanied by his attorneys of record. As reflected by the previous orders and judgments of this Court, the defendant has been tried by a jury and found guilty of the capital offense charged in the indictment. He has been afforded a sentencing hearing at which the jury recommended the punishment at life imprisonment without parole by a vote of 9 to 3. Defendant has been afforded all other hearings provided by law, including the challenge of the pre-sentence report, and other hearings as are evidenced by written findings of fact of record in this case.

The defendant, Anthony Keith Johnson, being asked by the Court if he had anything to say why the judgment of the Court and sentence of the law should not be pronounced against him replied, NOTHING.

It is now considered by the Court and it is its judgment, after weighing of all of the aggravating and mitigating circumstances, including the verdict of the jury,

that the defendant is guilty as charged in the indictment of the offense of capital murder and the Court hereby fixes his punishment at death by electrocution.

It is, therefore,

ORDERED AND ADJUDGED that the Sheriff of Morgan County, Alabama immediately deliver the defendant, Anthony Keith Johnson, into the custody of the Director of the Department of Corrections and Institutions, there to be safely kept by said Director until a date is fixed by the Supreme Court of the State of Alabama for the execution of this judgment after an exhaustion of defendant's appeals.

On that date and at such time fixed by the Supreme Court of this State, the designated executioner shall, at the proper place for the execution of one sentenced to suffer death by electrocution, cause a current of electricity of sufficient intensity to cause death to pass through the body of the said Anthony Keith Johnson until he is dead.

The Court Reporter shall immediately prepare a transcript of all of the evidentiary proceedings held in this case and the Clerk shall prepare the record proper. The appellate process shall commence this date.

This the 8th day of November, 1985.

R.L. Hundley

R.L. Hundley, Circuit Judge

END OF DOCUMENT

APPENDIX H

Order Denying Rehearing

United States Court of Appeals
for the Eleventh Circuit

September 14, 2001

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
SEP 14 2001
THOMAS K. KAHN
CLERK

No. 99-13198-P

ANTHONY KEITH JOHNSON,

Petitioner-Appellant,

versus

STATE OF ALABAMA,
JOHN E. NAGLE,

Respondents-Appellees.

On Appeal from the United States District Court for the
Northern District of Alabama

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC
(Opinion July 10, 2001, 11th Cir., 2001, _____F.3d_____).

Before: TJOFLAT, BLACK and MARCUS, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

ORD-42
(6/95)

(3)

Supreme Court, U.S.
FILED
FEB 15 2002
OFFICE OF THE CLERK

No. 01-885

IN THE

SUPREME COURT OF THE UNITED STATES

ANTHONY KEITH JOHNSON,

Petitioner,

v.

JOHN E. NAGLE,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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3/8P

QUESTIONS PRESENTED FOR REVIEW

The respondent, Warden John E Nagle, considers the following to be a fair and comprehensive statement of the questions presented for review:

1. Whether trial counsel's performance in not raising a defense that Johnson did not intend to kill was presumptively prejudicial when trial counsel's investigation revealed that Johnson did have the intent to kill.

2. Whether Johnson's contention that the court of appeals did not conduct an aggregate analysis of the ineffective assistance claims is factually accurate.

3. Whether the court of appeals correctly determined that requesting a felony murder instruction prejudiced Johnson because there was no basis for the trial court to give such a charge.

4. Whether the court of appeals correctly determined that a suppressed police report was not "material" because it did not dispute Johnson's presence at the crime scene.

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OPINIONS BELOW

On direct appeal, the Alabama Court of Criminal Appeals and the Alabama Supreme Court affirmed Johnson's conviction and sentence. *Johnson v. State*, 521 So. 2d 1006 (Ala. Crim. App. 1986), *aff'd*, *Ex parte Johnson*, 521 So. 2d 1018 (Ala. 1988). This Court denied certiorari review. *Johnson v. Alabama*, 488 U.S. 976 (1988).

Johnson filed a state collateral attack on his conviction and death sentence pursuant to Rule 20 (now Rule 32) of the *Alabama Rules of Criminal Procedure* on April 4, 1989. After conducting an evidentiary hearing, the state circuit judge denied the petition. The Alabama Court of Criminal Appeals affirmed this ruling in an opinion authored by retired Alabama Supreme Court Justice James H Faulkner. *Johnson v. State*, 612 So. 2d 1288 (Ala. Crim. App. 1992), *cert. denied* (Ala. 1993).

In June 1993, Johnson filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Alabama. After holding an evidentiary hearing, United States District Judge Edwin Nelson denied Johnson's habeas petition. *Johnson v. Nagle*, 58 F.Supp.2d 1303 (N.D. Ala. 1999). The court of appeals affirmed the district court's decision. *Johnson v. Alabama*, 256 F.3d 1156 (11th Cir. July 10, 2001), *rehearing and rehearing en banc denied*, 273 F.3d 1123 (Sept. 14, 2001).

STATEMENT OF JURISDICTION

This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1254(1). This Court should not, however, review the second issue because it was not squarely

presented to the court of appeals or the third issue because it was not raised in the courts below.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED

The statement of constitutional provisions and statutes involved in this case, which set forth on page two of the certiorari petition, is correct.

STATEMENT OF THE CASE

Johnson's present counsel first presented, in his initial state post-conviction petition, an entirely new version of events -- that Johnson participated in the robbery but did not have the intent to commit murder. Specifically, Johnson contends that trial counsel was ineffective for not presenting a theory that he was not one of the two robbers that went into the victim's home. Johnson's theory, which the courts have called the "third man" theory, is that the evidence supports a conclusion that Johnson accompanied two men who entered the Cantrell residence and fired shots at the victim, but only entered the house during a lull in the shooting just in time to be hit in the back by the dying victim's last shot. "This new conception of events has wound its way into almost every argument in this case[,]" *Johnson*, 58 F.Supp.2d at 1329, including this certiorari petition.

Unfortunately for Johnson, there are at least two problems with his "third man" theory. First, Johnson, despite being afforded evidentiary hearings in state and federal court, offers no evidentiary support for the "third man" theory. No person, not even Johnson himself, has

ever testified that Johnson accompanied two people into the victim's home for the purpose of committing a robbery, but that he did not participate in the murder of the victim. The Alabama Court of Criminal Appeals stated that "Johnson's 'third robber' theory is merely a theory without any evidentiary support." *Johnson*, 612 So. 2d at 1304. Second, evidence presented at the federal court evidentiary hearing demonstrated that Johnson's "third man" theory is perpetrated upon a fraud in that Johnson, before his trial, told his trial counsel that he was the second robber into the house and that he fired three shots at the victim. Habeas Tr. (March 19, 1996) at 22-27[1] (testimony of Joseph Probst), Id. at 53-58 (testimony of Thomas DiGiulian).[2]

The record of the state and federal court proceedings demonstrate that Johnson's present counsel fought very hard to keep out of the record any evidence of what Johnson told trial counsel. After the federal district court ordered an evidentiary hearing, Johnson's present counsel filed an interlocutory appeal that resulted in the court of appeals initially staying the hearing and then directing the district court to conduct an *in camera* hearing "to determine whether and to what extent Johnson had waived his attorney client privilege by attacking the competency of his attorneys." *Johnson*, 58 F.Supp.2d at

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[1] Citations to hearings held in February and March 1996 pursuant to Johnson's federal habeas petition are cited as "Habeas Tr. (date) at []." Citations to the record of the state post-conviction proceedings are cited as "R20 at []." Citations to the trial transcript are cited as "Tr. at []."

[2] Johnson's trial counsel was Joseph Probst and Thomas DiGiulian. Reference to them will be by the term "trial counsel" unless one is mentioned specifically by name.

1326-27 n. 14. The Eleventh Circuit ultimately vacated these orders and allowed the district court to conduct a hearing regarding "what [Johnson] told counsel about the crime and his role in it in order to assess whether their strategic and tactical choices were reasonable in the light of the information known to them." *Johnson*, 256 F.3d at 1168 n. 4. Evidence presented during the federal court hearing "revealed that present counsel were aware as early as 1988, before they filed their first Rule 20 petition, that Johnson had told his trial attorneys that he was, in fact, present at and participated in the robbery; that he personally fired shots at Mr. Cantrell; and that he was himself wounded by Mr. Cantrell." *Johnson*, 58 F.Supp.2d at 1326-27 n. 14. The court of appeals concurred with this finding stating that "these statements are indeed at odds with the theory of defense advanced now by Johnson's habeas counsel." *Johnson*, 256 F.3d at 1169.

A. Evidence Presented at Trial

The facts presented at trial are set forth at length in the opinions of the court of appeals and the district court. *Johnson*, 58 F.Supp.2d at 1314-15; *Johnson*, 256 F.3d at 1165-67. They show that, on the evening of March 11, 1984, the victim, Kenneth Cantrell, and his wife were at their home in Hartselle, Alabama. The Cantrells ran a jewelry business out of their home and were known to have large sums of money on hand. Johnson and another man, whose identity was first publicly revealed at the federal district court evidentiary hearing, entered the Cantrell's home for the purpose of robbing him. Both Johnson and the other robber were armed with loaded pistols and, during the exchange of gunfire that led to Mr. Cantrell's death, both Johnson and the other robber fired multiple shots at Mr. Cantrell. Johnson fired three shots, including the first shot that was fired by anyone. Mr. Cantrell returned fire, firing a total of six shots. Mrs.

Cantrell could not identify Johnson because he was wearing a blue bandana that covered his face.

After being mortally wounded, and with the last shot in his pistol, Mr. Cantrell fired a shot through a glass pane in the opened door and hit Johnson. At the time he was hit, Johnson was either standing in the dining room area behind the open door or was in the process of backing out or going out of that door. The bullet struck Johnson in the back and, when later removed under court order, it still had glass fragments embedded in its nose. The bullet was of the same type manufacturer used by Mr. Cantrell, and the bullet had the same number of lands and grooves as those test fired from Mr. Cantrell's handgun. Additionally, test comparisons of the glass removed from the bullet with that found in the pane on the door revealed that all of their physical properties matched, with no measurable discrepancies.[3]

After being shot, Johnson soon sought out the assistance of his friend, David Lindsey, for the purpose of seeking medical attention. Johnson told Lindsey he knew that Lindsey had been to Vietnam and asked if he knew a medic or someone who could get the bullet out. After telling Johnson he did not know anyone who could do that, Lindsey drove Johnson to a motel room to meet some of Johnson's friends. Lindsey heard Johnson make an admission of guilt during a conversation that took place in the motel room. Specifically, Lindsey heard

---

[3] Johnson contends that the court of appeals erroneously stated that "counsel did not learn of the State's evidence concerning the glass fragments until the 'eve' of trial." *Johnson's certiorari petition at 5 n. 3.* One of Johnson's trial counsel stated he received this evidence "way late," "within two or three weeks of trial." Habeas Tr. (March 19, 1996) at 40. The court of appeals' statement, therefore, was correct.

Johnson say that he had gone into a place to get some gold and had been shot. Then Johnson said, "I got shot, but I got off a couple of rounds, and I believe I got that son of a bitch." Upon returning to his home and finding out that there had been a murder in Hartselle, Lindsey immediately contacted law enforcement authorities.

When Johnson was arrested, he had in his possession a nickel-plated .357 caliber handgun. The weapon was consistent with Mrs. Cantrell's statement that the second robber was wielding a "real shiny" gun. None of the projectiles found at the crime scene could, however, be matched with Johnson's gun. Although one of the spent projectiles found at the scene was the approximate weight of a .38 or .357 caliber, it was too mutilated to tell if it had been fired by Johnson's gun. Tr. 607, 676-77. Johnson's gun, when found, had only three rounds in it, consistent with the forensic evidence that indicated the second robber had fired three times. *Johnson*, 256 F.3d at 1174 n. 9. Additionally, Johnson had a pair of brown boots that corroborated Mrs. Cantrell's testimony that the second robber into the home was wearing brown boots.

B. Trial Counsel's Performance

The record of the state and federal post-conviction proceedings show that, as part of their pre-trial preparation, trial counsel talked with potential witnesses and met extensively with Johnson. R20 at 638-39, 657, 58, 661, 737, 741. Johnson told trial counsel "the whole story," R20 at 638-39, and the defense theory was based upon what he told them. R20 at 638-39, 657-58, 661 737, 741. More specifically, the chosen defense was that Johnson was not present at the crime scene and was, therefore, not involved in the crime at all. R20 at 603, 674-75, 689, 694, 696-97, 739-40. Consistent with his previous testimony during the state post-conviction

proceedings, Thomas DiGiulian testified at the federal court evidentiary hearing as follows:

> We knew, or thought we knew, what the State could prove based on the preliminary hearing that we had and the transcript of that. And we decided that they couldn't prove the case, and that we felt like our best shot at winning was to take the position that Keith was not there and make the State prove it.

Habeas Tr. (Feb. 29, 1996) at 20-21. Trial counsel also knew, from their conversations with their client describing his involvement in the crime, that Johnson was guilty of capital murder and, therefore, they could not present any false testimony of the nature that he was a participant in the robbery but not in the murder. Habeas Tr. (March 19, 1996) at 59 ("I cannot ask him a question that will elicit an answer that I know is not true.")

Trial counsel made a reasoned strategic decision not to argue inconsistent alternative theories of defense. This decision obviously prevented them from arguing that Johnson was not at the scene while, at the same time, asserting he was involved but lacked the intent to kill. R20 at 603, 615-16, 632, 689-90, 694, 695, 967, 700, 702, 704. That strategic decision not to argue inconsistent theories was based upon trial counsel's informed judgment that, as a practical matter, there was little or no chance the jury would fail to find that Johnson had the intent to kill if the jury concluded that he had been at the scene. Trial counsel knew, at the time they made their strategic decision, that deliberation and premeditation were not required under Alabama law, and, therefore, it was irrelevant whether Johnson had the intent to kill before he went into the house. R20 at 607, 672. They also knew that if he had the intent to kill, Johnson could be

guilty of the capital offense even though he was not the actual triggerman. R20 at 703-05, 744-45.

Trial counsel gave consistent testimony at the state post-conviction hearing and federal court evidentiary hearing that showed they understood the State must demonstrate Johnson had the specific intent to commit murder. For example, Thomas DiGiulian stated the following:

> We had – if I remember the testimony correctly, there was one piece of physical evidence that linked Keith to that crime. And in my understanding of the facts, the only way that that evidence – talking about the glass in the nose of the bullet – he had to have been inside the house. And it was my understanding, based on those facts, that if the jury believed the expert testimony about the refractive index of the glass, that he would be convicted because he was in the house. There was only testimony of two people coming in[to the Cantrell house].

R9-58 at 68. This testimony reflects trial counsel's belief that, if the jury found Johnson was one of the two people in the Cantrell house, he would be found guilty of capital murder.

C. Johnson's "Third Man" Theory

Johnson's arguments are built upon the fact that under Alabama law the felony murder doctrine does not elevate intentional murder to capital murder. *See, e.g., Lewis v. State*, 456 So. 2d 413, 416 (Ala. Crim. App. 1984) ("[N]o defendant is guilty of a capital offense unless he had an intent to kill, and that intent to kill cannot be supplied by the felony murder doctrine."). According to

Johnson, the evidence at trial could be interpreted to indicate that there were three robbers on the scene, and that Johnson was not the second man, but rather the third man to enter the Cantrell home. Trial counsel, so Johnson contends, could have argued and sought instructions that allowed the jury the opportunity to find him guilty of felony murder, rather than capital murder.

Johnson bases his facile argument on some minor discrepancies in Mrs. Cantrell's testimony. The federal district court correctly notes that "[h]er testimony was a bit confused and difficult to follow, as well as inconsistent with the physical evidence in some significant respects." *Johnson*, 58 F.Supp.2d at 1330. Most objective observers would perhaps conclude that this is understandable since she was present in a small room where a gunfight took place and although she came out of it physically unhurt her husband was murdered before her.

Johnson's "third man" theory appears to rest entirely on the following part of Mrs. Cantrell's testimony:

> Q: Now, do you recall in your house that night where each of these two intruders were when your husband fired the last shot?
>
> A: They were over towards the door.
>
> Q: Now, in your recollection were they leaving the house or were they coming [sic] the house?
>
> A: They were leaving.
>
> Q: They were leaving. Now, they were leaving the house.
>
> A: I assume they were.

Q: Now, and your husband fired one last shot, is that correct?

A: That is correct.

Q: How long after that was it that you heard them leave the house?

A: It didn't take them long after that to start moving over further towards the door.

Q: Further towards the door?

A: That is right.

Q: So neither one of them was at the door when your husband fired the last shot?

A: No, they wasn't.

Q: They were not?

A: No.

Q: Was it inside the door now that we are talking about?

A: Yes.

Q: Was it open?

A: Yes, it was.

Tr. 385-86. Mrs. Cantrell speculated that the men "were probably going through things, looking for things." *Id.*

It is indeed very unusual to have a case in this posture where a theory teeters so precariously upon a misinterpretation of the record. Mrs. Cantrell testified that she was at her husband's feet between the coffee table and the couch while the shooting was taking place. Tr. 363, 365. She was consistent in her testimony making reference to a "first man" and a "second man" being

involved in the robbing and killing of her husband.[4] Tr. 360, 361, 362, 363, 364, 380, 381, 382, 383, 384, 385, 387, 388, 391, 392, 393, 394, 395. Nowhere in any of these references does she mention a "third man."[5] At the end of her testimony, the following reference leaves no doubt that Johnson's "third man" theory lacks any evidentiary support:

> Q: After your husband fired the last shot, the two men left, is that correct?
>
> A: Yes.

Tr. 387. The federal district court correctly notes that Mrs. Cantrell's preliminary hearing testimony gave trial counsel no reason to think about a "third man" defense:

> It is no exaggeration to say that none of the information counsel gathered in this fashion suggested even the possibility of a "third man" defense. Mrs. Cantrell's preliminary hearing testimony was not infected the problems which [Johnson] points to in her trial testimony. Indeed, at the hearing Mrs. Cantrell did not say much about the actual course of the gunfight and its aftermath, maintaining that after the first shots were fired she "couldn't tell nothing. It sounded like a bunch of fireworks." Transcript of Preliminary Hearing Held April 19, 1984 ("PHT") at 54;

---

[4] Mrs. Cantrell's reference to a "first man" and "second man" signifed their order of entry into the house.

[5] Johnson's trial counsel also only referred to a "first man" and "second man." See, e.g., Tr. 380-81. Trial counsel never referred to a "third man."

> see id. at 53, 70. On the other hand, she certainly did not seem to be of the opinion that a third man had entered the house, and indicated that the two intruders she described were all that were present "to [her] knowledge." PHT at 78.

Johnson, 58 F.Supp.2d at 1343. Trial counsel's notes, notes that Johnson's present counsel tried so hard to suppress from judicial view, establish that Johnson told his trial counsel a story very similar to Mrs. Cantrell's, a story which included the information that it was he who was the second robber in the house and that he fired several shots at the victim. See, e.g., Habeas Tr. (March 19, 1996) at 22-24, 29-30, 57-60, 74-75, 79.

REASONS FOR DENYING THE PETITION

This Court should deny certiorari review because none of Johnson's claims are worthy of certiorari jurisdiction. Certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. *Fay v. Noia*, 372 U.S. 391, 436 (1963), *overruled in part on other grounds by Wainwright v. Sykes*, 433 U.S. 72 (1977). Johnson does not set out sufficient reasons for this Court to grant certiorari on any of his claims.

I. TRIAL COUNSEL'S FAILURE TO RAISE A FELONY MURDER DEFENSE WAS BASED UPON THE FACT THAT THEY HAD NO EVIDENCE TO SUPPORT IT

Johnson contends that the performance of his trial counsel was *per se* deficient, under the test set out in *United States v. Cronic*, 466 U.S. 648 (1984), in not pursing the "third man" defense. Johnson further contends that the Eleventh Circuit's ruling that trial counsel's performance was not so presumptively prejudicial as to fit within the *Cronic* standard is in conflict with decisions from other circuits. Johnson's contentions are not worthy of further review because he has not shown any conflict and the decision that trial counsel's performance was not presumptively prejudicial is correct and supported by the record.

The Eleventh Circuit correctly ruled that *Cronic* "applies when counsel 'entirely' fails to challenge the prosecution, and that is indisputably not so here." *Johnson*, 256 F.3d at 1187 n. 17. In *Cronic* this Court held:

> The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted – even if defense counsel may have made demonstrable errors – the kind of testing envisioned by the Sixth Amendment has occurred.

Cronic, 466 U.S. at 656. This holding implies that the inquiry is whether counsel's conduct is such that it can be recognized as completely inappropriate in any case, so

bad that the defendant's counsel wasn't really acting as a lawyer at all.

Trial counsel's actions to not pursue the "third man" defense was based upon the fact that they had information from Johnson that indicated he was guilty of capital murder. This information was that Johnson was the second man into the house who announced "this is a holdup" and fired his gun before anyone else. Trial counsel had no information that Johnson had intent to commit only a robbery but not a murder. Trial counsel did not pursue a "third man" defense due to some presumptively prejudicial action or inaction, but rather because no evidence supported such a theory.

Johnson cites cases from the Sixth, Ninth, and Tenth Circuits as evidence that this case conflicts with those decisions. In *Cone v. Bell*, 243 F.3d 961, 977 (6th Cir. 2001), the court ruled that trial counsel's decisions to not present any evidence at the penalty phase and to waive closing argument was presumptively prejudicial under *Cronic*.[6] In *Osborne v. Shillinger*, 861 F.2d 612, 629 (10th Cir. 1988), the court ruled it was presumptively prejudicial under *Cronic* that trial counsel intentionally stressed the brutality of the defendant's crime, admitted that the evidence against his client was overwhelming, and made statements to the press that his client had not evidence to support his claims. The court further stated that "Osborn's attorney did not simply make poor strategic choices; he acted with reckless disregard for his client's best interests and, at times, apparently with the intentions to weaken his client's case." *Id.* In *United*

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[6] This Court recently granted certiorari review in *Bell*, presumably to determine whether trial counsel had legitimate strategic reasons for taking certain actions.

States v. Swanson, 943 F.3d 1070, 1074 (9th Cir. 1991), the court ruled trial counsel's performance was presumptively prejudicial under *Cronic* when he conceded in closing argument that there was no reasonable doubt that his client had robbed the bank, apparently the only factual issue in dispute. The present case does not present the "situation in which an attorney's conduct can be assessed generically and condemned as an utter failure of representation." *Johnson*, 58 F.Supp.2d at 1339. Johnson has not cited a case that has applicability to the facts in this case. This issue is clearly not one "where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal." *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923). Therefore, Johnson's claim is unworthy of certiorari review.

II. THE COURT OF APPEALS CORRECTLY DECIDED THAT IN VIEWING THE TOTALITY OF THE EVIDENCE TRIAL COUNSEL'S PERFORMANCE WAS REASONABLE

Johnson contends that, even if the errors of his trial counsel were not individually ineffective, when considered as a whole and in the context of the entire trial, the cumulative effect of these errors undermined confidence in the outcome of the trial. He specifically contends that the court of appeals rejected his entreaty to conduct an aggregate analysis of trial counsel's performance. Johnson asserts that the "Eleventh Circuit's piecemeal approach to assessing performance error is inconsistent with this Court's opinion in *Strickland*, and is in direct conflict with decisions of the Second, Fifth, Sixth, Seventh, and Ninth and (apparently) Tenth Circuits." *Johnson's petition at 15.*

In his haste to concoct an issue worthy of certiorari review, Johnson overlooks the fact that the court of

appeals did look at allegations of trial counsel's errors in the aggregate. The court stated in relevant part as follows:

> As best we can tell, Johnson makes two separate arguments based on *Cronic*. First, he contends that his attorneys' errors, viewed in the aggregate, constitute prejudicial ineffective assistance of counsel even if none of those errors, standing alone, constitutes a *Strickland* violation. We disagree; to the extent Johnson's attorneys committed performance errors, **those errors in the aggregate do not warrant setting aside his conviction.**

Johnson, 256 F.3d at 1187 n. 17. The court did not engage in an extensive analysis because Johnson did not specifically raise this issue.

In his brief to the court of appeals, Johnson does not squarely present this issue. Instead, in his introduction to the part of the brief listing the **individual** claims of ineffective assistance of counsel, Johnson states: "Viewing counsel's errors in the aggregate, as this court must do, it is clear that Johnson is entitled to relief under *Strickland*." *Johnson's 11th Circuit brief at 23.*[7] If the court of appeals' analysis of this issue was cursory, it was due to the fact that Johnson did not squarely present this issue to the court of appeals. Because of the fact that the court of appeals did review in aggregate, Johnson's claims

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[7] Ironically, even though in his petition to this Court Johnson lists the Eleventh Circuit as a circuit that does not review ineffective claims in the aggregate, in his brief to the court of appeals he cited circuit precedent indicating otherwise. *Johnson's 11th Circuit brief at 23 n. 14.*

of ineffective assistance of counsel, this claim is unworthy of certiorari review.

Furthermore, there is no conflict in the circuits on this issue. All of the circuits are applying this Court's holding in *Strickland* to "look at the totality of the evidence before the judge or jury," in determining whether the specific "acts or omissions of counsel" are constitutionally ineffective. *Strickland*, 466 U.S. at 688. This Court does not require a cumulative effect analysis of ineffective claims as is required in claims alleging that the prosecutor suppressed evidence. *See Kyles v. Whitley*, 514 U.S. 419, 436 (1995) (Evidence that the government failed to disclose to the defendant is considered collectively, not item-by-item, in determining whether "materiality" requirement of *Brady* has been satisfied.) In rejecting this issue, the district court clearly followed the holding of *Strickland* that each alleged error is to be individually analyzed in light of all the evidence presented:

> Nor is *Strickland's* rule adaptable to the generalized allegations leveled by petitioner. By its very nature, the *Strickland* analysis focuses on particular errors and the harm which flows from them. *Strickland* makes it clear that, to prove a claim of ineffective assistance of counsel, a habeas petitioner must identify a specific error and show prejudice flowing from that error. Nothing in *Strickland* suggests that a combination of several errors can be prejudicial when none, standing alone, would be sufficient to authorize relief.

Johnson, 58 F.Supp.2d at 1351-52. There is no conflict in the circuits on this issue and, even if there is, this case is not worthy of certiorari jurisdiction because the court of

appeals conducted the type of analysis that Johnson requested.

III. JOHNSON DID NOT RAISE IN THE COURTS BELOW THE ISSUE THAT IT WAS A DUE PROCESS VIOLATION FOR THE JURY NOT TO BE INSTRUCTED ON FELONY MURDER

Johnson presses an issue in his certiorari petition that he did not raise in the district court of the court of appeals. *See Johnson*, 58 F.Supp.2d at 1324-27 (listing the seven claims that were raised in the habeas petition). In his certiorari petition, Johnson raises the allegation that it was a violation of *Beck v. Alabama*, 447 U.S. 626 (1981), for the jury not to be instructed on felony murder. *See Johnson's certiorari petition at 23 n. 12* ("We deal with the *Beck* issue in this petition as an issue of due process.") This claim was raised in the courts below, however, as a claim of ineffective assistance of counsel because trial counsel did not seek a jury instruction on the offense of felony murder. *Johnson*, 58 F.Supp.2d at 1346-49; *Johnson*, 256 F.3d at 1181-83 ("Here, the question is different, in that we focus not on whether there was a Due Process violation, but rather whether the failure of Johnson's trial attorneys to ask for a felony murder instruction amounted to *Strickland* performance error and prejudice"). Because this claim was not raised in the courts below, this Court cannot grant certiorari review. *See* Rule 10, *Rules of the Supreme Court of the United States* (requiring that the federal question have been raised in the lower courts).

The court of appeals determined that Johnson was not prejudiced by the fact that his trial counsel did not seek an instruction on felony murder. The court stated as follows:

Like the district court, we can find no logical basis to conclude that an additional alternative charge would have led a rational jury down a different path. The jury already was presented with non-capital alternatives (intentional murder and robbery) and still found Johnson guilty of capital murder. A felony murder instruction would not have changed the standard for a conviction on capital murder, and so for an objective and rational jury – and we must presume this was such a jury – an instruction on that offense should not have changed the outcome. [Citation and footnote omitted.] Johnson's belief that the jury might have doubted the evidence of his intent to kill, but then nevertheless chosen to convict him for capital murder because it thought the only alternative was robbery and that offense would be too minor, is pure speculation, and highly strained speculation at that.

Moreover, as discussed above, there is little evidentiary foundation for Johnson's belief that the jury in his case might have been inclined to convict for felony murder in lieu of the other offenses. The weight of the evidence pointed to only two men, not three, with Johnson as either (1) one of the two men and therefore guilty of capital murder, or (2) not one of them and therefore not guilty altogether. That issue was the focus of the evidence and of the parties' arguments before the jury. In this context, unintentional murder was not so viable an option for the jury that the absence of an

> instruction on felony murder amounts to *Strickland* prejudice.

Johnson, 256 F.3d 1183. This ruling is a correct application of the principles this Court stated in *Beck* and *Schad v. Arizona*, 501 U.S. 624 (1991), and this Court, therefore should not grant certiorari review.

As the court of appeals correctly noted, there is absolutely no evidence to support the giving of a felony murder instruction. The Alabama Court of Criminal Appeals has noted on many occasions that the "purpose of the felony-murder doctrine is to hold felons accountable for unintended deaths caused by their dangerous conduct." *White v. State*, 587 So. 2d 1218, 1231 (Ala. Crim. App. 1990), *aff'd*, 587 So. 2d 1236 (Ala. 1991), *cert. denied*, 502 U.S. 1076 (1992). Thus, "[t]he offense of felony murder involves an intended felony and an unintended homicide." *Apicella v. State*, 2000 WL 218172 (Ala. Crim. App. Feb. 25, 2000), *aff'd*, *Ex parte Apicella*, 2001 WL 306906 (Ala. Mar. 30, 2001), *cert. denied*, *Apicella v. Alabama*, 122 S.Ct. 824 (Jan. 7, 2002). The evidence shows that Johnson accompanied one other person into the Cantrell home and that the victim received six gunshot wounds resulting in his death. Johnson carried a loaded weapon into the house and there was evidence presented that would allow a jury to conclude that Johnson had fired his gun three times. While the shots that Johnson fired were not the shots that killed the victim, there was no reasonable basis for the jury to doubt that Johnson had the intent to kill, attempted to kill, and actively participated in the killing. Soon after the shooting, Johnson commented to his friend that he had fired his weapon and thought he shot the victim. Based upon these facts, there is no rational basis for a verdict convicting Johnson of felony murder. *See* ALA. CODE § 13A-1-9(b) (1975) ("The court shall not

charge the jury with respect to an included offense unless there is a rational basis for a verdict convicting the defendant of the included offense.") There is not any evidence that the two people who went into the Cantrell house shot their guns unintentionally; indeed, all of the evidence shows that they acted intentionally. Because trial counsel's actions in not requesting a felony murder instruction did not prejudice Johnson, this Court should not grant certiorari.

IV. THE COURT OF APPEALS CORRECTLY DETERMINED THAT A SUPPRESSED POLICE REPORT WAS NOT "MATERIAL" BECAUSE IT DID NOT DISUPUTE JOHNSON'S PRESENCE AT THE CRIME SCENE

Johnson contends that this Court should grant certiorari to review his contention that the State violated the rule set forth in *Brady v. Maryland*, 373 U.S. 83 (1963), when it failed to produce "all information favorable to the defense" as requested in the defendant's pretrial discovery motion. Johnson focuses this Court's attention on a case report prepared by the Alabama Bureau of Investigation (ABI), which suggested that the police had identified suspects other than Johnson. *Johnson*, 58 F.Supp.2d at 1362.[8] Johnson correctly notes that the court of appeals states, since the ABI report was

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[8] The ABI report contains information that was addressed in the lower courts that is not mentioned by Johnson in his certiorari petition. Additionally, the lower courts addressed the claim that documentary evidence that the state was investigating two other suspects was suppressed. Because Johnson does not mention these parts of his *Brady* claim that were litigated below, the respondent will not either.

inadmissible, it could not have been used as substantive evidence for the defense. Johnson criticizes this holding by stating that "[t]he duty to disclose under *Brady*, however, extends to material that can be used in questioning adverse witnesses." *Johnson's certiorari petition at 26 n. 13.*

Johnson fails to note, however, that the court of appeals did conduct an analysis how this information could have been used in cross-examining Sergeant Newell of the ABI. The court stated as follows:

> Of course, to the extent the ABI report or the investigative notes merely suggested that there may have been participants other than Johnson in the attempted robbery of the Cantrells, that information does not establish that Johnson was not involved, or indeed that he was not the "second man." More to the point, we are unconvinced that evidence of that sort – identifying additional participants in the crime, but not directly disputing Johnson's presence or status as the "second man"[9] – could have been used to discredit in any meaningful way Sergeant Newell's testimony. Significantly, there was already evidence before the jury regarding the alleged involvement of other participants.

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[9] Johnson's conclusion that "the report excluded Johnson as one of the two participants in the killing of Cantrell," *see Johnson's petition at 25*, is incorrect.

Johnson, 256 F.3d at 1190. The court ultimately concluded that the use of this information during the cross-examination of Sergeant Newell would have been limited by the fact that the report only discloses information that the jury already knew, that others were involved, and it does not dispute the fact that Johnson was the second robber into the house.

Both trial counsel knew that the authorities had other suspects in the case and they specifically knew that the McCulloch brothers, the names mentioned in the ABI report, were suspects. Joseph Propst testified at the state post-conviction evidentiary hearing that he had not only heard rumors before the trial that the McCullochs were suspects, he had been told that they were by Sergeant Newell. R20 at 657-58. Both trial counsel testified at the federal court evidentiary hearing that they had been told by Keith Johnson that Garland McCulloch went into the Cantrell home first, Johnson went in second, and a person named Campbell was at the house but probably did not go into to the house. Habeas Tr. (March 19, 1996) at 57. Thomas DiGuiulian testified at the state post-conviction hearing that he talked with Sergeant Newell on several occasions before the trial and that Sergeant Newell told him there were other suspects. R20 at 747. In addition to the fact that trial counsel had the information to cross-examine Sergeant Newell regarding the existence of other suspects, the information contained in the ABI report only confirmed that Johnson did not act alone, something that was already known to everyone including the jury. There has never been a dispute that at least one other robber was involved in the crime. The actual identity of the other robber, and of any additional accomplices, does not exculpate Johnson who was present and who fired shots in an attempt to kill the victim.

Because the court of appeals correctly decided this issue, certiorari should not be granted. Furthermore, Johnson has not shown that the court of appeals decision is in conflict with a decision of this Court. Rule 10, *Rules of the Supreme Court of the United States.*

CONCLUSION

The Court should not grant certiorari for the reasons stated in this brief in opposition.

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No. 01-885

Supreme Court of the United States

ANTHONY KEITH JOHNSON,

Petitioner,

v.

JOHN E. NAGLE, WARDEN, AND
THE ATTORNEY GENERAL OF THE STATE OF ALABAMA

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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Respondents.

REPLY BRIEF FOR PETITIONER

The petition established that this death penalty case presents four substantial questions concerning the constitutional rights of criminal defendants. To differing extents, each of those questions is tied to trial counsel's fundamental failure to pursue the only true issue in Johnson's trial — whether the State proved that Johnson possessed the specific intent necessary under Alabama law to convict an accomplice of capital murder. As the district court found, although there was a substantial issue of fact as to Johnson's intent (App. B, p. 145a), "counsel simply did not think much about the intent issue at all." (*Id.* at p. 123a).

A major theme of the State's brief in opposition is that trial counsel could not have litigated Johnson's intent because Johnson allegedly told them "that he was the second robber into the house and that he fired three shots at the victim" and counsel were thus constrained from "present[ing] any false testimony of the nature that he was a participant in the robbery but not in the murder." (Opposition at 3, 7).

This argument is wholly without merit. The conclusion simply does not follow from the premise. Whatever Johnson told his attorneys (Propst and DiGiulian),

they were required to put the State to its proof. *See, e.g.*, *United States* v. *Wade*, 388 U.S. 218, 257-58 (1967) (White, J., concurring in part, dissenting in part) ("Our interest in not convicting the innocent permits counsel to put the State to its proof, to put the State's case in the worst possible light, regardless of what he thinks or knows to be the truth....[D]efense counsel will cross-examine a prosecution witness, and impeach him if he can, even if he thinks the witness to be telling the truth, just as he will attempt to destroy a witness who he thinks is lying."). Indeed, trial counsel's professed strategy, as misguided as it was on the facts, was to attempt to demonstrate that the State had not proved that Johnson was present at the Cantrell home.

A defense attorney is not only permitted but obligated to exploit a failure of proof through skillful cross-examination, effective argument, and the like.[1] Counsel in this case, therefore, were required to seize upon the testimony of the only eyewitness to the crime indicating that Johnson had not been a participant in the shootout;[2] to argue

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[1] *See* American Bar Ass'n, Standards for Criminal Justice Standard 4-93 (2d ed. 1980) ("[W]here the defendant has admitted guilt to the lawyer and does not plan to testify, and the lawyer simply intends to put the state to its proof and raise a reasonable doubt, skillful cross-examination of the prosecution's witness is essential. Indeed, were counsel to forgo vigorous cross-examination of the prosecution's witnesses, counsel would violate the clear duty of zealous representation that is owed the client.")

[2] Simply ignoring the inconvenient portions of the record, the State asserts that there is no evidence to support the argument that Johnson was a third man not guilty of capital murder. As set forth in the petition (Pet. at 4), Mrs. Cantrell's testimony regarding the location of the two original intruders when Mr. Cantrell fired his last shot supports the conclusion that Johnson was not a participant in the shootout. In addition, Mrs. Cantrell testified that

other evidence that he had not been a participant; to develop evidence that more than two people had been at the crime scene, as they knew to be the case; and to argue to the judge and, if necessary, the jury that the State had failed to prove beyond a reasonable doubt that Johnson had the requisite intent.

The State does not explain how counsel could ethically rest their defense on the theory that Johnson was not even present at the scene, but could not rely on the more modest theory that he lacked the necessary intent to kill. There is no explanation. The difference between the two theories has nothing to do with legal ethics. The difference is that the argument that intent had not been proved, which trial counsel did not "think much about," may very well have appealed to a jury that voted 9 to 3 against the death penalty,[3] whereas the defense that counsel professed to pursue was bound to be rejected because the victim's bullet was found in Johnson's back. In fact, if the State were correct on the facts, Johnson's defense counsel were barred from putting on any defense at all, and Johnson no longer enjoyed the right to effective representation by counsel. That clearly is not so.

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the two intruders helped the third, wounded man (*i.e.*, Johnson) away: "Sounded like *they* were trying to help him out. I mean his feet just shuffled." (Tr. 368, emphasis added).

In any event, as the district court recognized, there was a serious question concerning Johnson's intent even setting aside the "third man" point. (App. B, p. 145a).

[3] Alabama law allows a trial judge to overrule a jury's decision that a capital murder defendant should not die. This Court has granted certiorari in *State* v. *Ring*, 25 P.3d 1139 (Ariz. 2001), *cert. granted*, 122 S. Ct. 70 U.S.L.W. 865 (U.S. 2002) (No. 01-488), to determine whether such a system is constitutional.

The State is not even correct on the facts. The record does not show that Johnson told his counsel that he intended to kill Cantrell or that only two men had entered the house. Counsel Propst's notes record that he was told that "[d]efendant pulled gun and fired twice." (*Id.* at 24). However, Propst stressed that he had not concluded that Johnson had the intent to kill Cantrell, and that Johnson did not tell him that he had fired *at* Cantrell. Propst did not know "where he fired it or in what direction." (*Id.* at 36).[4] The State was unable to match any of the bullets found at the crime scene to the gun found on Johnson when he was arrested.

More fundamentally, counsel recognized the unreliability of Johnson's account:

> Now, let me explain this to you, Judge. When I first met Keith Johnson, he was very strung out on narcotic drugs, almost to the point that his communications sometimes were garbled. And there was a good period of time that he was incapable of telling me what — you know, what he remembered about the events. (*Id.* at 26).[5]

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[4] Counsel DiGiulian did not recall whether Johnson had told him that he had fired a gun at the Cantrell residence, and his notes of his talks with Johnson did not record any such statements. (Habeas Tr. (Mar. 20, 1996) at 57).

[5] The State points to Propst's testimony that Johnson had told trial counsel "the whole story," with the apparent implication being that what he had told them somehow prevented them from addressing the exculpatory evidence relevant to the issue of intent. (Opposition at 6). Mr. Propst's mention of the "whole story," however, was a reference to the fact that he and DiGiulian were aware that the McCulloch brothers were involved in the crime, a point that counsel failed to develop at trial. (*See* R20 at 638-39).

It should be no surprise then that none of the decisions challenged by Petitioner rested on what their client had told them. (*See* Pet. at 14 n.6).

I. PETITIONER'S *CRONIC* CLAIM

Johnson asserted that his trial counsel's failure to litigate the issue of intent constituted a failure to subject "the prosecution's case to "meaningful adversarial testing." *United States* v. *Cronic*, 466 U.S. 648, 659 (1984). The Eleventh Circuit dismissed this claim because it concluded that *Cronic* applies only "when counsel 'entirely' fails to challenge the prosecution, and that is indisputably not so here." (App. A, p. 47a n.17). The court's opinion directly conflicts with the Sixth Circuit's decision in *Cone* v. *Bell*, 243 F.3d 961 (6th Cir. 2001), *cert. granted*, 122 S. Ct. 663 (2001) (No. 01-400). In that case, the court held that *Cronic* applies even when defense counsel actively defended the accused at trial, and this Court recognizing a conflict among the circuits has agreed to review the Sixth Circuit's decision.

The State attempts to argue that no conflict is presented by recasting the question at issue in *Cone* as "whether counsel's conduct is such that it can be recognized as completely inappropriate in any case." (Opposition at 13). The State's recharacterization does not withstand scrutiny. This Court granted certiorari on the question whether *Cronic* applies to an alleged failure to litigate an issue critical to the outcome of the defendant's case even "where defense counsel conducts a thorough pre-trial investigation, presents lay and expert witness testimony ..., [and] conducts direct and cross examination ...." (Pet. for Cert. in *Bell* v. *Cone*, No. 01-400). The Sixth Circuit answered in the affirmative. The Eleventh Circuit has disagreed. The decision below should be reviewed along with *Bell* v. *Cone* to resolve the circuit conflict.

II. PETITIONER'S *STRICKLAND* CLAIM

Petitioner established that there is a split among the circuits as to whether, under *Strickland* v. *Washington*, 466 U.S. 668 (1984), courts must review counsel's alleged performance errors cumulatively, with the court below following the minority position that it need not. The State inconsistently argues that this Court should not review this question because (1) both the district court and the court of appeals correctly rejected the argument that cumulative analysis is required (Opposition at 17); and (2) the Eleventh Circuit did in fact appraise trial counsel's errors in the aggregate for the purposes of its *Strickland* review. (*Id.* at 16).

The State is correct that the lower courts in this case rejected the use of cumulative analysis, and other courts have understood them to have done so. *See Leary* v. *Garraghty*, 155 F. Supp.2d 568, 577 (E.D. Va. 2001) (where the court relied on the district court's decision in this case, as well as a case from its own circuit, for the proposition that cumulative review is not to be used in analyzing counsel's performance under *Strickland*).

The State's alternative assertion that the court of appeals conducted the requisite cumulative analysis rests on the footnote dismissing Johnson's claim under *Cronic*, not *Strickland*. In fact, in the footnote, the court explicitly distinguished between claims of ineffectiveness under *Strickland*, which it had reviewed "standing alone," with the aggregated appraisal required by the *Cronic* test. (App. A, p. 47a n.17). The court rejected Petitioner's *Cronic* claim on the grounds described above. It was only by failing to address the cumulative impact of counsel's errors that the Eleventh Circuit was able to avoid confronting Johnson's basic claim that the key issue of intent was not meaningfully presented to the jury.

The State asserts that Petitioner did not squarely present this issue to the court of appeals. (Opposition at 16). However, as the State itself recognizes, Petitioner asserted that the court was required to view trial counsel's alleged errors "in the aggregate." (*Id.*) The very next sentence of Petitioner's brief stressed that: "Counsel's mistakes so infected the trial that the prosecution's flimsy case on intent effectively went unchallenged...." (Pet. Eleventh Cir. Br. at 23-24); (*see also id.* at 24-28) (discussion under the heading "Trial Counsel Ignored the State's Failure to Prove Specific Intent").[6] That is precisely what Petitioner argues here. The Eleventh Circuit rejected the contention, concluding that, under *Strickland*, alleged performance errors were to be analyzed "standing alone." (App. A, p. 47a n.17).

III. PETITIONER'S *BECK* CLAIM

The Court below rejected Petitioner's claim that, under *Beck* v. *Alabama*, 447 U.S. 626 (1981), and *Schad* v. *Arizona*, 501 U.S. 624 (1991), he was entitled to a felony murder charge on the ground that "[a] felony murder instruction would not have changed the standard for conviction on capital murder, and so for an objective and rational jury — and we must presume that this was such a jury — an instruction on that offense should not have changed the outcome." (App. A, p. 39a).

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[6] The State also asserts that in the court below Petitioner relied on Eleventh Circuit precedent for the proposition that that cumulative analysis is required under *Strickland*'s performance prong. (Opposition at 16 n.7). To the contrary, the precedent was cited for the separate point that, under *Strickland*, a court must "assess *prejudice* by aggregating the errors at each stage of trial." (Pet. Eleventh Cir. Br. at 23 n.14) (emphasis added).

The State makes no attempt to explain how the court of appeals' reliance on the "presumption of a rational jury" is consistent with *Beck*'s and *Schad*'s holdings that a capital defendant is entitled to have the jury instructed on a lesser-included offense that "makes sense" in the light of the record. (*See* Pet. at 23-24). The State instead asserts that Johnson did not raise this issue as a question of due process in the courts below, but rather only as an aspect of his ineffective assistance of counsel claim. That is incorrect. Johnson has consistently raised the issue separately from his ineffective-assistance claim. (*See* Pet. Br. in Ala. Ct. Crim. App. at 24; Pet. Br. in Ala. Sup. Ct. at 34; Pet. District Court Opening Br. at 34; Pet. Eleventh Cir. Br. at 28; Pet. Eleventh Cir. Petition for Rehearing at 14).[7]

In any event, whether viewed as a question of due process or ineffective assistance, the fundamental issue is the same. Was Johnson deprived of a felony murder charge to which he was constitutionally entitled as a viable alternative to capital murder?

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[7] The Eleventh Circuit panel appears to have mistakenly concluded that Johnson was not asserting that the failure to give a felony murder charge constituted a violation of his due process rights. (App. A, p. 38a, "[W]e focus not on whether there was a Due Process violation, but rather whether the failure of Johnson's trial attorneys' failure to ask for a felony murder instruction amounted to *Strickland* performance error and prejudice."). As Petitioner made clear in his petition for rehearing, he intended to raise the failure as an issue separate from the ineffective-assistance claim. (*See* Pet. Eleventh Cir. Petition for Rehearing at 14, citing Pet. Eleventh Cir. Br. at 28, "Johnson was constitutionally entitled to a felony murder charge in order to give the jury a realistic third option between conviction for capital murder and acquittal.").

IV. PETITIONER'S *BRADY* CLAIM

The State asserts that it was not required to turn over to the defense an Alabama Bureau of Investigation ("ABI") report which noted that Garland and Wayne McCulloch "did the shooting" because the report "only discloses information that the jury already knew, that others were involved." (Opposition at 23). The report obviously says more than that others were there. It says that two men other than Johnson "did the shooting." Further, the jury was never told that there had been more than two men at the crime scene. The entire trial was allowed to proceed on the State's "main argument" that, because only two men had been present and Johnson had been present, Johnson had to have been one of the two participants in the shooting. (App. A, at pp. 18a-19a). The ABI report would have helped to establish that more than two people were present at the Cantrell home, and thus that proof of Johnson's presence was not proof of his guilt of capital murder.

CONCLUSION

The petition for a writ of certiorari should be granted.

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